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June 14

OKLAHOMA REPORTS

VOLUME XIX

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

Territory of Oklahoma

AT

O

The June, 1906, and June, 1907, Terms

R. L. WILLIAMS, CHIEF JUSTICE, *Ex Officio* Reporter
HOWARD PARKER, Assistant

1909
THE STATE CAPITAL COMPANY
Guthrie, Oklahoma



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JUDGES OF THE SUPREME COURT

OF THE

TERRITORY OF OKLAHOMA

During The Period Covered By This Volume

HON. JNO. H. BURFORD.....	Chief Justice.
HON. BAYARD T. HAINER.....	Associate Justice.
HON. BENJ. F. BURWELL.....	Associate Justice.
HON. CLINTON F. IRWIN.....	Associate Justice.
HON. FRANK E. GILLETTE.....	Associate Justice.
HON. J. L. PANCOAST.....	Associate Justice.
HON. M. C. GARBER.....	Associate Justice.

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HON. GEO. W. OUTCELT.....	Assistant United States Attorney.
HON. W. O. CROMWELL.....	Attorney General.
HON. BENJ. F. HEGLER.....	Clerk.
HON. JOHN ABERNATHY.....	United States Marshal.

JUSTICES OF THE SUPREME COURT

OF THE

STATE OF OKLAHOMA

At the time this volume was published.

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JESSE J. DUNN.....	Justice.
SAMUEL W. HAYES.....	Justice.
MATTHEW J. KANE.....	Justice.
JOHN B. TURNER.....	Justice.

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W. T. FIELD.....	Marshal
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NOTE: This volume contains the opinions of the Territorial Supreme Court hitherto unpublished. That court, on November 18, 1907, was succeeded by the State Supreme Court.

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THE
SUPREME COURT,

TERRITORY OF OKLAHOMA.

JUNE TERM, 1906.

PRESENT:

HON. JNO. H. BURFORD, CHIEF JUSTICE.

HON. BAYARD T. HAINER,

HON. BENJ. F. BURWELL,

HON. CLINTON F. IRWIN,

HON. FRANK E. GILLETTE,

HON. J. L. PANCOAST,

HON. M. C. GARBER,

} ASSOCIATE JUSTICES.

ENID & ANADARKO RAILWAY COMPANY, *a Corporation*, v. JAMES
A. KEPHART.

(Filed September 6, 1906.)

(91 Pac. 1049.)

1. **PUBLIC LANDS—Grant in Aid of Railroads—Right of Way—Homestead Entry.** A railroad company appropriating land for its right of way across a tract of land covered by the homestead entry of another becomes an unlawful trespasser and obtains no right either in law or equity to the land.
2. **SAME.** A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it, from the public domain, and precludes it from subsequent appropriation for right of way for railroad purposes under the

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Enid & Anadarko Ry. Co. v. Jas. A. Kephart.

act of 1875, granting right of way to railroad companies through the public lands of the United States.

3. **SAME—Cancellation of Entry—Effect on Right of Way—Case.** Where A has a homestead entry upon a tract of government land subject to homestead entry, and B enters thereon while said entry is intact, and makes settlement, and a railroad company enters and appropriates a strip one hundred (100) feet wide across said tract for its right of way, having filed its articles of incorporation and profile maps with the secretary of the interior, and the same having received his approval under the act of 1899, providing for condemnation proceedings and payment; and thereafter B, by contest proceedings in the United States land office secures the relinquishment of A to be filed in the United States land office, and immediately thereafter makes homestead entry for said tract under a preference right as successful contestant, and complies with all the provisions of the law to preserve said entry, **Held**, that the cancellation of A's entry did not cause a reversion of the right of way to the railroad company under the act of 1875, granting right of way to railroad companies through the public lands of the United States.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

M. A. Low, Blake, Blake & Lowe, and W. C. Stevens, for plaintiff in error.

Black & Trosper, for defendant in error.

STATEMENT OF FACTS.

On the 29th day of January, 1903, the defendant in error, James A. Kephart, brought this action in the district court of Comanche county to recover damages from the plaintiff in error, Enid & Anadarko Railway Company, a corporation, for the wrongful and unlawful invasion, appropriation and occupancy of a certain portion of his land for railroad purposes. The case was tried to the court upon an agreed statement of facts, resulting in a judgment for plaintiff in the sum of five hundred seventy-five dollars (\$575.00), and defendant brings the case to this court, alleging error.

Statement of Facts.

In his petition the plaintiff below alleged, substantially, that he is the homestead entryman, occupant and claimant for the northwest quarter of section ten (10), in township two (2), south of range eleven (11) W. I. M., in Comanche county, Oklahoma Territory, having made homestead entry No. 10,324 on the 31st day of July, 1902, at the United States Land Office at Lawton, Oklahoma; that he now resides thereon, and is in the lawful, exclusive, and peaceable possession thereof, save and except for the wrongful acts and trespasses of the defendant, plaintiff in error herein; that the defendant wrongfully and unlawfully entered upon said tract of land without the consent, and over the express objection, of plaintiff, and, by excavation and fill, constructed a railway embankment and grade, running and extending through and across said tract of land in a diagonal direction from the north to the south line thereof, and thereby occupied, and forcibly excluded plaintiff from a strip of valuable land one hundred (100) feet in width through and across the most valuable portion of said tract, to the damage of the plaintiff in the sum of nine-hundred dollars (\$1,900.00).

In the amended answer, relied upon by the defendant, and upon which the cause was submitted, the defendant admitted that it was a corporation, and, in addition to a general denial, alleged that on the 6th day of February, 1902, and prior to the date of plaintiff's homestead entry, and prior to his settlement upon the land, it filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, and located its line of railway, and within twelve (12) months after making said location, and prior to the settlement and entry of plaintiff, caused to be filed with the register of the land office at Lawton, Oklahoma Territory, in the land district in which the land was situated, a map and profile of its road showing a section thereof thirty (30) miles in length, and as constructed and operated through said tract of land; that said map and profile was duly approved by the honorable secre-

Enid & Anadarko Ry. Co. v. Jas. A. Kephart.

tary of the interior in the month of February, 1902, and prior to said settlement and entry, and prior to the time that the rights of the plaintiff, if any, had been acquired or attached to said land, subject to the right of way of the railway company; that the defendant entered upon the tract of land, described in plaintiff's petition, and constructed a continuous line of railway grade and road through and across said land, and occupied, for railway purposes, a strip of land one hundred (100) feet in width through and across said tract; that the defendant completed its thirty (30) mile section of the road within one year after its said location; and that the land of the plaintiff at the time of the location of the defendant's railway line, and the filing of said maps and plats, was a part of the public lands of the United States.

Plaintiff replied denying each allegation of said answer not admitted by the petition or reply, and alleged that on the 3rd day of September, 1901, William Gillies made homestead entry for said land; that on or about February, 1902, and prior to the attempted occupancy and appropriation by the defendant, plaintiff made settlement on the tract of land to establish his residence thereon, and has resided on the land ever since, making it his home to the exclusion of any home elsewhere, with the intent to acquire title thereto under the homestead laws of the United States; that on March 4, 1902, plaintiff filed a contest against the entry of Gillies, charging speculation, and abandonment, which was the only valid pending contest against said entry at the time when Gillies filed his relinquishment; and that by virtue of such pending contest plaintiff acquired a preferred right to make homestead entry on said tract under the act of Congress, approved May 14, 1880, 21 Statutes 140, and under the rules and regulations and decisions of the department of the interior of the United States; and that on the 31st day of July, 1902, Gillies filed his relinquishment in the land office at Lawton, in and for the district in which said tract of land was located, and on the same day that plaintiff made his homestead entry for said tract.

Statement of Facts.

The agreed statement of facts upon which the cause was submitted is as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the following statement of facts shall be taken and considered upon the trial by the court as facts proven on the trial of the above entitled action, and the same are now hereby admitted to be true by the parties hereto, respectively, to-wit:

"First. That on the 3rd day of September, 1901, at the United States Land Office at Lawton, Oklahoma Territory, William Gillies made homestead entry under the homestead laws of the United States, of the northwest quarter ($\frac{1}{4}$) of section numbered (10), in township numbered two (2) south, of range numbered eleven (11) west of the Indian Meridian, in Comanche county, Oklahoma Territory, being the identical tract of land over which the right of way is in controversy in this section, and that from and after said September 3, 1901, said tract was so covered by the valid and subsisting homestead entry of said William Gillies up to the time that he relinquished on July 31, 1902.

"Second. That plaintiff Kephart made settlement and established his residence on said land on or about February 10, 1902, and has resided on said land ever since.

"Third. That plaintiff on March 4, 1902, filed a contest against said homestead entry of William Gillies, charging speculation and abandonment, which was the only valid pending contest against said entry at the time of the filing of Gillies' relinquishment.

"Fourth. That on July 31, 1902, relinquishment of said William Gillies for said claim was filed in the United States Land Office at Lawton, Oklahoma, and immediately thereafter, and on the same day plaintiff Kephart made homestead entry for the said land under a preference right as successful contestant, and has resided thereon as homestead claimant ever since.

"Fifth. That plaintiff has never made any conveyance or agreement for conveyance of any portion of said land to defendant, or for its use, and has never been paid or proffered payment for right of way over said tract by defendant.

"Sixth. That defendant is a corporation, as alleged in plaintiff's petition, and that it entered upon said tract of land and constructed over and across the same a continuous line of railroad grade and roadbed, and occupied for said purposes a

Enid & Anadarko Ry. Co. v. Jas. A. Kephart.

strip of land one hundred (100) feet in width through and across said tract of land.

"Seventh. That on the sixth day of February, 1902, and prior to said plaintiff's homestead entry described in his petition, and prior to his settlement upon the said land, defendant filed with the secretary of the interior a copy of its articles of incorporation and due proofs of its organization under the same, and on or before the 6th day of February, 1902, located its line as afterwards constructed and operated to, over and across the said lands, and within twelve months after making said location, and on the 27th day of February, 1902, caused to be filed with the register of the United States Land Office at Lawton, Oklahoma Territory, and of the land district in which said lands were situated, a map and profile of its said road showing a section of thirty (30) miles in length, running over and across the land herein described, and constructed and operated through and across said tract; that said map and profile were afterwards approved by the honorable secretary of the interior after July 31, 1902; that said defendant commenced the construction of said road across the said land on the — day of February, 1902, and completed the said road within one year after the said location.

"It is further agreed between the parties hereto that if the rights of the plaintiff in and to the lands hereinabove described were prior and superior to the rights of the said defendant through, over and across the same, the said plaintiff is by virtue of that fact entitled to recover as the value of his interest in the lands taken, and as damages as to that portion of the said lands not taken for right of way of the said railway company to the sum and amount of five hundred seventy-five and 00-100 dollars (\$575.00) and no more.

"And that in the event of final decision in favor of the said plaintiff, judgment shall be entered for the said plaintiff for said sum, provided, however, that nothing contained in this stipulation shall deprive either party of a right to do any act necessary to secure a review of the decision of the district court or any other court herein, on any question of law by any other court having competent jurisdiction.

"It is further stipulated and agreed that this cause shall be determined by the district court of Comanche county, Oklahoma

Statement of Facts.

Territory, and a judgment rendered therein upon the foregoing statement of facts without other or additional evidence.

"In addition to the facts stated in the above statement, it was agreed by the plaintiff and defendant: That in the month of February, 1902, the defendant filed in the office of the secretary of the interior a true copy of the map and profile described in the said agreed statement, which map was certified by the president and chief engineer of the defendant, as follows:

"State of Illinois, County of Cook ss.

"W. E. Dauchy, being duly sworn, says that he is the chief engineer of the Enid and Anadarko Railway Company; that the survey of route of said road from a point on the line of the Chicago, Rock Island and Pacific Railway, forty-six (46) feet east and three hundred and thirty-eight (338) feet north of the southwest corner of section thirty-two (32), township two (2) north, range eleven (11) west of the Indian Meridian, and ending at a point one hundred fifty-five (155) feet east, and fifteen hundred eighty (1,580) feet north of the southwest corner of section six (6), township three (3) south, range ten (10) west of the Indian Meridian, in the territory of Oklahoma, a distance of twenty (20) miles, was made under his direction as chief engineer of the company and under its authority, commencing on the first day of September, 1901, and ending on the fifteenth day of December, 1901; and that such survey is accurately represented on this map.

"W. E. DAUCHY, Chief Engineer.

"Sworn and subscribed to before me this 14th day of Jan. 1902.

"[SEAL]

FRANK STEWART, Notary Public.

"My commission expires Sept. 22, 1902.

"I, M. A. Low, do hereby certify that I am president of the Enid and Anadarko Railway Company; that W. E. Dauchy, who subscribed the foregoing affidavit, is the chief engineer of the said company; that the survey of line of route of the company's (road), as accurately represented on the accompanying map, was made under authority of the company; that the said line of route so surveyed and as represented on the said map was adopted by the company by resolution of its board of directors on the thirty-first day of December, 1901, as the definite location of its road from a point on the line of the Chicago, Rock Island and Pacific

Enid & Anadarko Ry. Co. v. Jas. A. Kephart.

Railway, forty-six (46) feet east, and three hundred thirty-eight (338) feet north of the southwest corner of section thirty-two (32), township two (2) north, range eleven (11) west of the Indian Meridian, and ending at a point one hundred fifty-five (155) feet east, and fifteen hundred eighty (1,580) feet north of the southwest corner of section six (6), township three (3) south, range ten (10) west of the Indian Meridian, in the territory of Oklahoma, a distance of twenty (20) miles; that the map has been prepared to be filed for the approval of the secretary of the interior, in order that the company may obtain the benefits of the act of congress approved March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes." I further certify that the said railroad is to be operated as a common carrier of passengers and freight.

"M. A. Low,

"President of the Enid & Anadarko Railway Company.

"ATTEST: F. C. MARSHALL,

"[SEAL]

Secretary.'

"That said map and profile were approved by the said secretary through Thomas Ryan, acting secretary, in the following language endorsed thereon on the date borne by the same, to wit:

"Dept. of the Interior, February 6, 1902.

"Approved, subject to the provisions of the act of March 2, 1899 (30 Stat. 990), and subject also to any prior, valid, existing rights and adverse claims.

"THOS. RYAN, Acting Secretary.'

"It is also agreed that the railway line through, over and across the described land was constructed under contract by a contractor from the said company, who in turn employed subcontractors to grade the same, and they in doing such grading placed some earth excavated on said line more than fifty feet from the center line of said railway as located and constructed.

"That previous to July 31, 1903, defendant through its agent had conversation and negotiations with plaintiff as contestant on said land, and with his attorney, for the purpose of right of way through said land; but that defendant hesitated to make purchase and payment, and declined to do so because of the unsettled condition of the title, there being several contests and adverse claims to said land."

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Opinion of the court by

GARBER, J.: From the agreed statement of facts in this case it appears that one William Gillies, on the 3rd day of September, 1901, made a valid homestead entry on the northwest quarter of section ten (10), in township two (2), south of range eleven (11), W. I. M., in Comanche county, Oklahoma Territory, being the tract of land in controversy in this action; that from and after said date said tract of land was covered by the homestead entry up to, and including, the 31st day of July, 1902; that the plaintiff, Kephart, made actual settlement and established his residence on said land on the 10th day of February, 1902, and has since resided thereon; that on March 4, 1902, he filed a contest against the homestead entry of Gillies, which contest was pending in the United States land office on the 31st day of July, 1902; that on that date, the said Gillies, as the result of said contest, relinquished his homestead entry, and thereupon the plaintiff, Kephart, immediately made his homestead filing thereon under a preference right as successful contestant; that the plaintiff, Kephart, never made any conveyance to, or any agreement for a conveyance of any portion of said land to the defendant company, and has never been paid for the right of way over the same; that the defendant company entered upon said land and constructed its grade and roadbed, and has occupied the same for the purposes of its railroad on a strip one hundred (100) feet in width through and across said tract; that it filed with the secretary of the interior a copy of its articles of incorporation on the 6th day of February, 1902; that on that date had located its line as afterwards constructed over and across said land, and on the 27th day of February, 1902, caused to be filed with the register of the United States land office at Lawton, Oklahoma Territory, the same being the land district in which said tract is situate, a map and profile of its said road running over and across the land described therein; that the said map and profile were approved by the secretary

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of the interior on February 6, 1902, and the defendant commenced the construction of its road across said land sometime during the month of February, 1902, and completed the same within one year thereafter.

In this case we do not hesitate to approve the reasoning and conclusion expressed in the written opinion of the learned trial judge as a conclusive exposition and a correct statement of the law in the case, and which in our judgment remains wholly unanswered by the exhaustive briefs of counsel for plaintiff in error.

Plaintiff in error relies upon the act of March 3, 1875, 18 U. S. Stat. 482, c. 152, which provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road material, earth and stone, and timber necessary for the construction of such railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station to the extent of each station for each ten miles of its road."

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road, and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which right of way shall pass shall be disposed of subject to such right of way, provided that if any section of said road shall not be completed within five years after the location of said section, the

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rights herein granted shall be forfeited as to any such completed section of said road."

The line of definite location of the railroad which determines the rights of the company to the right of way under the above act is definitely fixed within the meaning of the act by the filing of a profile map, showing its location, with the secretary of the interior, and upon his approval the public land over which such right of way shall pass shall be disposed of subject to such right of way. And it is held that the construction of the company's roadbed is sufficient notice, to those who take subsequently, that the company has taken its right of way under the act.

The act of 1875 grants the right of way to railroad companies only through the public lands of the United States. Was the tract in question public land at the time of the approval of the company's profile plat by the secretary of the interior, viz., February 6, 1902? The authorities without conflict determine that question in the negative. The homestead entry made by Gillies on September 3, 1901, segregated the tract from the public domain, and the company obtained no right under the act by filing its profile plat, or by its occupancy, for the reason that it was not public land at the time. And for the same reason the plaintiff, Kephart, secured no right to the tract by his settlement. In fact, both were mere trespassers upon the land, and remained such until the cancellation of the homestead entry of Gillies on July 31, 1902.

It is insisted by counsel for the plaintiff in error that, since the plaintiff alleges that he contested Gillies on the ground of abandonment and speculation, the court should take judicial notice of the fact that plaintiff could only contest Gillies by filing an affidavit showing that he had abandoned the land, and if, as a matter of fact, the land had been abandoned by Gillies, he had no claim upon the railroad company, and the land had, by such abandonment become subjected to the company's rights without compensation to him. That homestead entry, valid upon its face,

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constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and preclude it from subsequent homestead entry or settlement, or right of way, until the original entry is canceled or declared forfeited, is supported by all the authorities, and may now be regarded as one of the fundamental principles underlying the land system of this country. *Chotard v. Pope*, 12 Wheaton (U. S.) 586; *Wilcox v. Jackson*, 13 Peters (U. S.) 498; *Carroll v. Stafford*, 3 Howard (U. S.) 441; *Witherspoon v. Duncan*, 4 Wallace (U. S.) 210; *Pacific R. Co. v. Dunmeyer*, 113 U. S. 629; *Hastings & Dakota R. R. Co. v. Whitney*, 132 U. S. 357; *Sturr v. Beck*, 133 U. S. 541; *Sioux City & Iowa Falls v. Griffey*, 143 U. S. 40; *Whitney v. Taylor*, 158 U. S. 85; *McMichael v. Murphy*, 12 Okla. 155, 70 Pac. 189; *Hodges v. Colcord*, 12 Okla. 313, 70 Pac. 383; *Holt v. Murphy*, 15 Okla. 12, 79 Pac. 265.

The land department has repeatedly held that an entry segregates the land covered thereby, and so long as such entry exists it precludes any other disposition of the land. *Whitney v. Maxwell*, 2nd Land Dec. Dep. Int. 98; *Schrotberger v. Arnold*, 6th Land Dec. Dep. Int. 425; *Allen v. Curtis*, 7th Land Dec. Dep. Int. 44; *Faulkner v. Miller*, 16th Land Dec. Dep. Int. 130.

It is conceded by plaintiff in error that the location and construction of its road did not at the time of said location and construction create a right in the company which would prevent Gillies from securing just compensation for the appropriation of his land for the right of way had his inceptive right continued, but it is insisted that the land had always been a part of the public domain, subject, however, to the homestead rights of Gillies which had attached; that the cancellation of Gilles' entry was not needed to restore it to the public domain, but terminated the claim of Gillies, and, at the time of relinquishment, the company had filed with the secretary of the interior due proofs of the location of its line across the tract, together with a map and profile of the same, which map and profile were on file in the United States

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land office at Lawton, the same being in the land district in which the said tract was located; that it had commenced the construction of its road, and, in short, had complied with all the provisions of the act to entitle it to take its right of way thereunder prior to the time that Kephart filed his contest, viz., March 4, 1902, and prior to the relinquishment of Gillies; and that by reason thereof the right of the company to the right of way attached prior to the rights of Kephart.

The law of the case will not warrant the conclusion. The land was not a part of the public domain at the time the company filed its profile map with the secretary of the interior and took possession of the land. That the company recognized this, and that it could not take its right of way under the act of 1875, is shown in the certificates of the president of the company, written upon the maps themselves, setting forth the purposes and object of their filing, and designating the act under which it sought to obtain benefits. The latter part of the certificate, stating the object and act under which the company proceeded, reads:

"This map has been prepared to be filed for the approval of the secretary of the interior in order that the company may obtain the benefits of the act of congress approved March 2, 1899, entitled 'An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands and Indian allotments, and for other purposes.'"

The approval of the acting secretary was made subject to the provisions of the act of 1899, and is as follows:

"Department of the Interior, February 6, 1902. Approved subject to the provisions of the act of March 2, 1899 (30 Stat. 990), and subject, also, to any prior valid existing right and adverse claims.

THOMAS RYAN, Acting Secretary."

The act of 1899, referred to, required condemnation proceedings and payment for right of way, and it is admitted that the company paid neither Gillies nor Kephart. It is also admitted that, had the inceptive right of Gillies continued, the defendant company would have had no right to the land, not even a germ of

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right that could possibly ripen into tangible fruition, without the relinquishment of the rights of Gillies; that it was a trespasser without legal excuse, and would have had to pay Gillies for its right of way; but, notwithstanding these admissions, it is insisted by the company, without blush or embarrassment, that it was upon the land in a receptive attitude, and when the rights of Gillies were terminated by the contest proceedings of Kephart, it received the benefits of the act of 1875 *eo instante* automatically, before Kephart could legally seize the fruits of his own efforts. It might be as consistently argued that Kephart was also upon the land in a receptive attitude. He was there before the company was, but the receptivity of the respective parties was impotent to create a right in either. Something had to be done to change the legal status of things; legal proceedings to be brought requiring aggressive actions as well as the assumption of the attitude of legal receptivity. The railroad company did nothing. Kephart assumed the aggressive. He acted; he instituted the only legal proceedings authorized by law to secure the cancellation of the homestead entry of Gillies.

The fourth clause of the agreed statement of facts reads:

"That on July 31, 1902, relinquishment of said William Gillies for said claim was filed in the United States land office at Lawton, Oklahoma, and immediately thereafter, and on the same day, plaintiff, Kephart, made homestead entry for the said land under a preference right as successful contestant, and has resided thereon as homestead claimant ever since."

In the case of *Hodges v. Colcord*, 12 Okla. 313, 70 Pac. 383, the supreme court of this territory said:

"The filing of Gayman, being regular and valid upon its face until canceled in a proper proceeding and by a proper authority, segregated the land from the public domain. Therefore the settlement of Hodges could avail him nothing until the filing of Gayman was canceled, and the only way to cancel Gayman's entry was by proper and authorized proceedings."

Section 2, 21 U. S. Stat. 141, entitled "An act for the relief

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of settlers on public lands," and under which the plaintiff claims his right to recover in this action, reads:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated, of such cancellation, and shall be allowed 30 days from date of such notice to enter said lands."

Kephart began the proper and authorized proceedings, which resulted in the termination of the rights of Gillies and a preference right to himself as a successful contestant. Should he now be required to surrender his preference right which the law gives him, or any portion of it, to the railroad company?

Why should the rights of the company be superior to those of Kephart? It represented to the land department and the public that it would pay for the land under the provisions of the act of 1899, and after occupancy and possession, and the successful contest of Kephart, it now claims a portion of the fruits of Kephart's victory under the act of 1875. It was a trespasser and wrongdoer *ab initio*, and shall it now be permitted to profit by its own wrong, and reap where it has not sown? Of what value to Kephart is the preference right of making his homestead filing upon the land, if by reason of his successful contest he finds the land, or a valuable interest therein, has passed *ipso facto* to the railroad company? Should he not be permitted to enjoy the fruits of his victory?

This whole subject has been carefully considered and appropriately discussed by Mr. Justice Miller in his opinion in the case of *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S. 629, wherein he says:

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had

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never been within the exception. We are unable to perceive the force of this proposition. When the line was fixed, which we have already said was by the act of filing the map of definite location, then the criterion was established by which the lands to which the road had a right were to be determined.

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others with grants in similar language have more than once passed through military reservations for forts and other purposes, which had been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land? The company had no absolute right until the road was built, or to that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations.

"The reasonable purpose of the government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land, or to be founded on this statute."

If, as is said by Justice Miller, "no right to such land passes by this grant", how can it be claimed that a right of way stands

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upon any higher or better ground? It is true that was a land grant case, but if the grant of the whole of the land did not give the railroad company any right to the land, under like condition, why should the grant of merely the right of way inure to the benefit of the company to any greater extent?

In the case of *Hodges v. Colcord et al.*, 12 Okla. 313, 70 Pac. 383, it was held:

“Where A has a homestead filing upon a tract of government land that is subject to homestead entry, and B, while said homestead filing is intact, enters thereon and makes settlement, and one day after the settlement of B, C files a contest, in the local land office, charging that A is disqualified to hold the land covered by his filing and from obtaining title thereto under the homestead laws by reason of having entered the territory during the prohibited period, and claims a preference right, and, subsequently, and while said contest is pending, A relinquishes his filing to the government, and the land department holds the relinquishment to be the result of the contest of C, *Held*: That the preference right of C is not defeated or impaired by the adverse settlement claim of B acquired subsequent to the entry of A.”

If a private citizen cannot by his prior occupancy defeat the preference claim and right of the successful contestant, how can it be said that a railroad company should be permitted to do so?

The case of *Jamestown and Northern Railroad Company v. Jones*, 177 U. S. 125, cited and relied upon by defendant, determines only that the construction of the railroad is equivalent to the filing of its map and profile with the secretary of the interior, so far as notice to settlers upon land traversed by its roadbed are concerned. In this case the line of the railroad was located October 30, 1880, and the road was built in 1882. No homestead entry was made on the land until after the construction of the road, and the final proof of defendant in error, Jones, was not made until about ten years afterward when he procured the relinquishment of a homestead entry of one Ella Sharp, made March 7, 1883. It will be seen that neither the right of Jones as a homestead entry-

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man nor any right he may have acquired through the relinquishment of Ella Sharp reached back to the date of the construction of the road, and the supreme court holds that the actual construction of the road was notice to the homestead entrymen, which precluded them from acquiring any title by homestead entry to the right of way occupied by the railroad company. The decision in that case does not take into consideration two pre-emption contests made on the land prior to the construction of the road, probably because the defendant in error, when he made final proof, was not a successor in interest to either of them, and the right of such pre-emption entrymen had expired under his homestead entry. Under these circumstances the determination of the supreme court that the railroad company's title to its right of way was superior to the title of Jones under his homestead entry, is not an authority applicable to the facts of the case under consideration.

The case of *Bonner v. Rio Grande R. R. Co.* (Colo.) 72 Pac. 1065, has no application to the facts in the case at bar, for the reason that the original locators of the mining claim had granted to the railroad a right of way across the claim, and afterwards, abandoned the claim. The case only determines that after the abandonment, and after the construction of the railroad, a relocation of the claim was subject to the railroad easement. There was no contest in reference to the mining claim, but, if there had been, it could have made no difference with the result because of the grant of the right of way by the original locators, and because there is no provision of law granting the preference right to the successful contestant of a mining claim over any other occupant of the land.

In the case of *Alexander v. K. C., Ft. Smith & Memphis Company*, 138 Mo. 464, 40 S. W. 104, the right of way had been purchased from Simpson:

"The defendant company acquired a right of way of Simpson. and entered and built its road; but Simpson never perfected his title to the homestead, and never obtained his patent, but abandon-

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ed the land, according to the weight of the evidence, sometime in 1882, after the company had built its railroad and was operating it as a part of a great interstate system between Kansas City and Birmingham, Alabama. The map showed that the railroad was located over the land in controversy, and plaintiff had been on the land, employed and aided in building defendant's railroad thereon. He, of all men, could not be ignorant of the location of the road and the claim of defendant. After Simpson's homestead entry was canceled in March, 1884, this plaintiff made a homestead entry of this land with full knowledge of the construction and operation of the railroad thereon."

The case of *Kinion v. K. C., F. S. & M. R. R. Co.*, 118 Mo. 577, 24 S. W. 636, is not applicable to the case at bar, for the reason that the court expressly found that:

" * * * It is an undisputed fact that plaintiff knew the road had been located across this land, the right of way acquired, and the work of the construction of the road commenced, when he made his homestead entry. He therefore made his entry subject to all of the rights of the company."

In the case of *Roberts v. Northern Pacific Railroad Company*, 158 U. S. 9, the company acquired title by purchase, and expended large sums of money upon the land. The court held:

"The railroad company having acquired title from the owner, a subsequent purchaser from the owner, long after the company had entered upon visible and notorious possession under a valid contract, for a valuable consideration, could not maintain either trespass or ejectment; nor would he, as such purchaser, be entitled to recover damage for the occupation of the land, because, under the present claim, the benefit would go to a private party who bought with the knowledge of the county's previous sale, and who admits that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale."

A careful examination of the authorities cited discloses material and controlling facts in each case which do not exist in the case at bar. As the successful contestant, Kephart, secured a preference right to the land, and his admitted compliance with all the requirements of the law to preserve that right, precludes the com-

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pany from taking its right of way under the act of 1875; and it must now respond in damages to the plaintiff.

For the reasons above stated, the judgment of the district court will, therefore, be affirmed.

Gillette, J., having presided in the court below, not sitting; Burford, C. J., Burwell and Pancoast, J J., dissenting; all the other Justices concurring.

THE
SUPREME COURT,

TERRITORY OF OKLAHOMA.

JUNE TERM, 1907.

PRESENT:

HON. JNO. H. BURFORD, CHIEF JUSTICE.

HON. BAYARD T. HAINER,	}	ASSOCIATE JUSTICES.
HON. BENJ. F. BURWELL,		
HON. FRANK E. GILLETTE,		
HON. CLINTON F. IRWIN,		
HON. J. L. PANCOAST.		

HON. M. C. GARBER,

GUTHRIE & WESTERN RAILROAD COMPANY, *a Corporation*, v.
W. L. RHODES.

(Filed June 25, 1907.)

(91 Pac. 1119.)

1. **EVIDENCE—Parol Evidence—Written Contract—Supersession of Oral Negotiations.** Under the laws of this territory, the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument; hence, where a note is given as subscription to a railroad corporation to aid in the construction and building of said road, any representation made prior to or contemporaneous with the execution of the note are inadmissible to contradict, change, vary, or add to the conditions plainly incorporated into and made a part of said note.
2. **BILLS AND NOTES—Action—Defenses—Misrepresentation.** In the absence of any proof that the signer of a note or written instrument is unable to read, an answer which admits the execu-

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tion of a subscription note sued upon, but alleges that the person procuring the note had misrepresented the conditions of the same and the extent of the liability that the defendant would incur in signing the same, where the note is in plain language and unambiguous in its terms, such answer will be insufficient to constitute a defense.

(Syllabus by the Court.)

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Reversed and remanded.

Green, Martin & Tibbetts and Devereux & Hildreth, for plaintiff in error.

Cottrell & Hornor, for defendant in error.

STATEMENT OF THE CASE.

This was a civil action, tried in the district court of Logan county to collect a promissory note executed by the defendant in error to the plaintiff in error, of which the following is a copy:

"\$500.

Guthrie, Okla., January 9, 1900.

"On completion of the railroads of the Guthrie and Western Railway Company and the Kingfisher and Guthrie Railway Company from Kingfisher, Oklahoma, from a point on the Chicago, Rock Island and Pacific Railway at or near Kingfisher, to a point on the main line of the Atchinson, Topeka & Santa Fe Railway Company at or between the stations of Seward and Guthrie, for value received, in consideration of the construction of said railroads, I promise to pay to the order of the Guthrie and Western Railway Company five hundred dollars (\$500.00) at the Guthrie National Bank, Guthrie, Oklahoma, with interest at 10 per cent. per annum from completion of said railroad. I hereby waive presentment for payment, notice of non-payment, protest and notice of protest. If suit be instituted, I agree to pay 10 per cent additional as attorney's fee, and in case of judgment said attorney's fee to be included in said judgment.

[10 Cent Int. Rev. Stamp.]

"W. L. RHODES."

The petition is in the usual form, declaring on the note and alleging specifically that the plaintiff had fully complied with all the terms and conditions of the contract. To this petition answer was filed. The answer pleads, first, a general denial. For a

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second defense the answer admits the execution of the note, but alleges that the execution was procured by misrepresentation and fraud, and pleads as the facts constituting the fraud that the plaintiff resides in the city of Guthrie, and is a property holder and interested in the growth and development of the city; that at the time the note was given the Atchinson, Topeka & Santa Fe Railroad was the only railroad running in or out of said city, and that for commercial purposes it would tend to enhance the value of property in the city to get new lines of railroad constructed into it; that at the time the said note was given the Chicago, Rock Island and Pacific Railway Company was operating a line of railway about 35 miles west of Guthrie, and that said railroad had extensive lines of railway, and was of great benefit to cities into which it ran its road; that at the said time property owners in the city of Guthrie were anxious to secure other lines of railroad in addition to the Santa Fe for said city, and were willing to pay money in order to get such lines into the city; that a short time prior to January 9, 1900, public notice was given in Guthrie that there would be a mass meeting for the purpose of hearing a proposition submitted by the Rock Island Railroad to build its line into Guthrie; that said notice was circulated by Henry Asp and J. B. Beadles, and other persons, who acted for the subsequently incorporated plaintiff; that on the evening announced for the meeting the defendant and a large number of citizens assembled, and persons there present, representing the interest afterward incorporated into the plaintiff, made speeches concerning the purpose of the meeting and laying before the people a proposition to raise money to induce the Rock Island Railroad to build into Guthrie; that it was stated by Henry E. Asp and several others, afterward incorporated under the name of the Guthrie and Western Railroad Company, that if the citizens of Guthrie would donate the sum of \$15,000 raised by subscription, the Rock Island would build and operate a line of railway from Kingfisher to Guthrie; that the advantages of such a connection to the city of Guthrie were set forth

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in those speeches for the purpose of inducing those present and other citizens to subscribe for said bonus; that the speakers claimed to have information that, if the subscription was raised, the Rock Island would build from Kingfisher to Guthrie; that subscriptions were then called for and various persons subscribed, and that the name of this defendant was called, and he was requested to subscribe \$500, when he said that he would subscribe \$500 if one J. M. Brooks would do the same; that Brooks refused, but that several people at the meeting cried out that Brooks would subscribe the \$500, although Brooks continued to refuse; that defendant does not know whether Brooks subscribed \$500 or not, but that he made his subscription on the condition that Brooks did so, and that he had the impression that Brooks had subscribed the \$500; that the defendant signed the note set out in the petition in haste, and did not read it, except he saw it was for the sum of \$500 and defendant supposed that the note conformed to the statements which had been made by Mr. Asp and others at the meeting; that it was stated at the meeting that the road might be built under another name, but it really was the Rock Island road; that at the time he signed said note he believed that his subscription was for the purpose of inducing the Rock Island road to build into Guthrie, and that he formed this opinion from what was said at the meeting, and that nothing was said at said meeting which would intimate that the Santa Fe Railway had anything to do with the project. but it was stated that it was not a Santa Fe project, but a Rock Island enterprise; that defendant had no information on the subject, except what he got at the meeting, and that he believed and relied on these representations, and, if the representations had not been made, he would not have signed the note. Defendant further alleges, in this paragraph of his answer, that the Rock Island road has never built into Guthrie, and that in fact the Guthrie and Western Railway is not part of the Rock Island system, but is a branch of the Santa Fe road; that it was well known to the persons who presented the proposition to the people of Guthrie and to

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the defendant to raise said bonus that the Rock Island road had no intention of building into Guthrie, and that the road intended to be built would be a part of the Santa Fe system, and not of the Rock Island system; that the person making these representations was the agent of the plaintiff, and made the proposition for and on behalf of the plaintiff, and of the Santa Fe Railway, and misrepresented the facts in order to raise the subscriptions, and that no one would have subscribed said bonus if it had been known that it was a Santa Fe scheme; and, knowing this, the agent of the plaintiff carefully cultivated the impression that it was not a Santa Fe, but a Rock Island, project; that the defendant gave the note in suit solely upon such representation, and that there was no other consideration, save the proposition to get the Rock Island into Guthrie. Defendant further alleges that said Brooks never subscribed \$500.

For a third defense, defendant substantially alleges that the plaintiff and its agent fraudulently represented that the proposed bonus, to which the defendant subscribed, was for the purpose of inducing the Rock Island Railway to build into Guthrie, when in fact the bonus was to be used to build a branch for the Santa Fe, and that the defendant executed the note sued upon believing that it was to induce the Rock Island road to build into Guthrie. The fourth defense alleges a conspiracy to induce the defendant and others to subscribe by making bogus subscriptions. The fifth defense was that subscriptions largely in excess of \$15,000 were obtained, but there was no evidence offered under this defense. The sixth defense is that the note was void, because under the charter the road would have been built from Guthrie, and not from Seward.

To this answer, and each paragraph thereof, except the general denial, the plaintiff demurred on the ground that the facts stated did not constitute a defense. This demurrer was overruled, to which exceptions were saved. Thereupon the plaintiff replied by a general denial, and the case was tried on these issues. Verdict

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was returned in favor of the defendant. Motion for new trial was filed and overruled, exceptions saved, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: In this case the plaintiff in error relies upon six assignments of error. We think it will only be necessary to consider three: First, the overruling of the plaintiff's demurrer to the amended answer; second, error in admitting testimony for the defendant over the objection of the plaintiff; sixth, that the court erred in overruling plaintiff's motion for a new trial. It will be observed, from a perusal of this record, that the entire subject matter of the defendant's defense to this note is based upon statements made of promises at a meeting of citizens held in Guthrie, prior to the execution of this note, which meeting was held for the purpose of raising a bonus to secure a line of railroad from Kingfisher, on the Rock Island, to Guthrie. There is nothing in the record so far as the proof shows to indicate that any of the parties making these statements at said meeting were acting for or authorized to act for, or pretended to be acting for, the holder of this note. And, even if they were, such statements made prior to, or contemporaneous with, the execution of this note, and being statements which were in direct conflict and contradiction with the plain, unequivocal terms of the note, would not be sufficient to constitute a defense to the note under the plain provisions of our statute. The Revised Statutes of Oklahoma 1893, section 822, reads as follows:

"The execution of a contract in writing; whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument."

This provision of the statute was no doubt designed by the legislature to preclude the admission of oral testimony to vary, contradict, or change the terms of a written contract, and was in strict accord with the spirit and principles of the common law

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on this subject. This note, by its terms, sets forth in clear, distinct and unmistakable language all the terms, qualifications, and conditions attached thereto, and no person of ordinary understanding could read such a note and have any doubt as to its intention, purport, and meaning. The allegations of the answer amount only to a statement that at a public meeting held, not in the name of the payee of this note, not purporting to be held by the authority of the Guthrie and Western Railway Company, but held by the citizens for the purpose of securing a public expression from the resident property owners of Guthrie as to whether it was advisable to raise the bonus necessary to secure this connecting line of road or not, certain representations and statements amounting to promises were made by certain persons in certain public speeches, and in our judgment amount only to expressions of opinion as to the benefits to be derived from securing this line of road. An examination into the evidence will show that the recollections of the defendant in error as to what took place in that meeting, the expressions that were used, and the promises that were made are very uncertain and indefinite. On page 61 of the record the following appears in the testimony of the defendant in error:

"Ques. Who made that statement? Ans. Judge Green, if my memory serves me right.

"Q. Geo. S. Green? A. Geo. S. Green; yes, sir.

"Q. You may state what he said. (Objected to, for the reason it is hearsay and irrelevant, which objection was by the court overruled.)

"Q. Go ahead and state what he said. A. Well—

"Q. Did he get up on his feet and talk? A. He did.

"Q. Go ahead and state what he said. A. He said this meeting was for the purpose of securing a bonus of \$15,000 to secure the Rock Island Railroad for Guthrie.

"Q. Is that all he said? A. Well, I couldn't tell you. It has been quite a while—four or five years. I can't remember all that he said in regard to it. He made quite an address there, and enthused everyone so much as to say—

"Q. What was the subject of his address? (Objected to, as

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not binding on the plaintiff company and tending to contradict the terms of the written contract made subsequent to it, which objection was by the court overruled, to which the plaintiff excepted.) A. I don't remember now.

"Q. You can't undertake to say every word he said, but I want you to undertake to outline his address. A. Judge Green's address?

"Q. Yes, sir. A. Well, I don't remember all of it—but very little of it—it has been so long, I don't suppose I have thought of it since that time, only just that meeting run through my mind, and who got up there and spoke, but I can't— (Objected to, as to the competency of the witness, which objection was by the court overruled.) A. I think I have given you about all I remember of it, about him making the statement that it would be the Rock Island road, and by securing this \$15,000 they would run the Rock Island road into Guthrie, and by that means secure one of the great trunk lines of the United States. I remember that part of it—great trunk line."

On page 90, in Mr. Rhodes' testimony, the following appears:

"Ques. You have stated, after you came off the stand, that you weren't certain about one proposition, about Lou Beadles, did you? Do you wish to make any other statement in regard to that? (Objected to, as assuming a statement not in evidence, which objection was by the court overruled, to which the plaintiff excepted.)

"Q. Go ahead. A. Well, now, I stated I thought it was Lou Beadles writing the notes, but since I went off the stand it kind of run through my mind that it was young Geo. Green.

"Q. You wouldn't be certain about either one? A. No, I wouldn't. It is five years, and I ain't got a very good memory anyway."

Now, in our judgment, these statements, and this kind of evidence is not sufficient to warrant the court in receiving it for the purpose of ingrafting a new condition into a written contract. We think, under the authorities, and under the plain letter of this statute, parol evidence was not admissible to add a condition to this note, especially when the note itself, on its face, distinctly informs the defendant that he was to pay the \$500 upon the completion of

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the railroads mentioned in the note. A contract of this kind is legal and enforceable, as decided by our supreme court in the case of *Piper v. Choctaw Northern Town Site & Improvement Company*, reported in 16 Okla. 436, 85 Pac. 965. It will be ascertained from an examination of the evidence that the recollection of the defendant in error as to what took place at that meeting is somewhat indistinct, from the fact that he says his understanding was he was not to sign this note unless one J. M. Brooks should have first subscribed \$500, that at that meeting Brooks distinctly refused to subscribe, and that he did not know afterwards whether Brooks subscribed or not. This seems to us like a very singular statement, that a man would base his promise to subscribe upon the promise of another, and that he was not to sign the note or pay the bonus except in the event that the other party paid a similar amount, and that he then should sign a note which contained the plain unequivocal conditions of this note without first ascertaining whether the other had complied on his part or not. Furthermore, it seems to us that these representations, if any were made at that meeting, were representations as to mere matters of opinion, and as to something that was to transpire in the future. The representations do not refer to past or existing facts, but relate wholly to what may transpire in the future. The most that can be contended for the defendant is an expression of opinion as to what may transpire in the future. While the note in question, it is true, is based upon conditions, yet, as shown by the allegations of the plaintiff and the proof in the case, all of those conditions which were contained in the note had been complied with in both letter and spirit at the time of the commencing of this suit. We take it that the rule is elementary that to constitute a representation which amounts to a fraud, as the term "fraud" is understood in the law, there must be a statement or representation as to a fact, and must be as to a fact existing in the present or in the past. Now, according to the claim of the defendant, it was alleged in that meeting that a certain railroad corporation would build and operate this

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road. There is nothing to show that any person at that meeting possessed any superior knowledge concerning this matter, or that the representations were made upon any authority of the Guthrie and Western Railway Company, to whom this written obligation was made payable. The most that can be claimed is that it was an expression of opinion as to what would take place in the future, and we think the answer is wanting in all the essential elements which constitute a fraud. It is elementary that the representations made must relate to a present or past state of facts, and that relief as for deceit cannot be obtained for the non-performance of a promise or other statements looking to the future. In support of this doctrine, see Bigelow on Frauds, 11, 12; *Matty v. Austin*, 65 Wis. 527, 27 N. W. 162; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775.

The rule has been repeatedly held that the defendant cannot be relieved on the ground of fraud unless an action can be maintained for deceit, and it has been held in respect to representations relating to a future fact as a mere expression of opinion that such representation is not fraudulent or actionable if it relates to a future event, and is of the opinion that a railroad will be built and operated by a certain well-known railroad corporation.

The rule is laid down in *Gordon v. Butler*, 105 U. S. 553, by Mr. Justice Field, that an expression of opinion, however fallacious, in regard to property, the value of which depended upon contingencies, is not sufficient to predicate fraud upon.

In the case of *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179. representations made by vendor of mining stock that the vendee could not lose upon his investment and that the mines would pay a dividend in the near future, being a mere expression of opinion, or a promise of a future condition of things, will not form a ground of recovery by the vendee on the ground of false representations.

In the case of *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161. it was held that a representation by a defendant that the plaintiff could have possession of a certain building on property leased to

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plaintiff on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future, and not to a past or present, event.

In the case at bar the defendant seeks to avoid the payment of this note by setting up certain facts or representations with reference to what would take place in the future, and upon these alleged frauds, which he says were practiced upon him, he seeks to avoid the payment of the note which he acknowledged he signed. It is well settled in principle, as well as by authority, that no statement as to what would be done or was intended to be done in the future constitutes a fraud. It was so expressly held in the case of *Milwaukee Brick & Cement Company v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. The Wisconsin supreme court said:

"But no statement as to what would be done or intended to be done in the future constitutes a fraud. To be such it must relate to a present or past state of facts." See also: *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Field v. Siegel*, 99 Wis. 609, 75 N. W. 397.

In *McAlister v. Indianapolis and C. R. Co.*, 15 Ind. 11, it was held:

"A citizen of a certain town made unconditional subscription to the stock of a railroad company, the company promising that the branch of the road should be made to the town in which the subscriber resided. Held, that such subscriber could not recover the money paid on the ground of fraud in failing to build the road to the town, the promise being no more than the expression of an existing intent to make such branch."

It seems to us there is another essential element lacking in this answer, and that is, there is no allegation as to any damages having been sustained. According to the allegations of this answer the railroad was to have been built and operated in a certain way. Now, if it is conceded, for the purpose of argument, that this is true, it does not appear wherein or in what manner the defendant has been damaged. It is conceded that this line of railroad, connecting the two great trunk lines in the territory, has been built.

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But it is claimed that, because it is not operated by a certain company, or as originally built by a certain company, or in a certain way to suit the ideas and notions of the defendant, that in that way he has been injured, and relieved of his obligation.

In the case of *Parker v. Jewett*, 52 Minn. 514, 55 N. W. 56, it was held:

"An answer setting up fraud or deceit as defense to a promissory note should show damage and the extent thereof. The action is upon a promissory note. The answer sets up as a defense that the note was given for mining stock, and that the defendant purchased the same, relying upon certain representations which he alleges were false and fraudulent. * * * The answer winds up by stating generally that the defendant had derived no benefit in any way, and had received no consideration whatever for the note."

The court observed:

"It does not appear that the mine in question has not some value, or that the stock is worthless, or of how much less value it was than the amount paid for it; in other words, it does not show what, or how much, damage defendant had suffered. When the basis of the defense to a promissory note given upon the purchase of property—as, in this case, stock—is fraud and deceit, through which the defendant was induced to purchase that which proves to be of no value, or of less value than contracted to be paid therefor, it is obvious that the facts should be pleaded, whether the defense attempted to be made is complete or partial.

In the case of *Godding v. Colorado Springs Live Stock Company*, 4 Colo. App. 14, 34 Pac. 944, it was held that mere expressions of opinion are not false representations. A misstatement, to be actionable, must relate to existing facts peculiarly within the knowledge of the party, and they there cite *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 209; *Adams v. Shiffer*, 11 Colo. 29, 17 Pac. 21. Cooley on Torts. 468-474.

The rule was stated by Chancellor Kent, in his Commentaries, vol. 2, star page 485:

"The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and

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folly, or an indifference to the ordinary and accessible means of information.”

In this case the note is couched in clear, distinct and unmistakable language. It is explicit as to all its terms and conditions. There is no evidence that the party signing the same was incapable of reading, or that any artifice or deceit was practiced upon him to prevent his reading it. The only excuse for not reading it and understanding its terms is that he signed it hastily, presuming it contained all the conditions indicated by the representations made at the public meeting mentioned in his evidence. We take it the rule is well established that in the absence of any evidence of incapacity to read, or any trick or artifice resorted to to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound by its express terms and conditions therein contained, and that he cannot set up his own carelessness and his own indolence as a defense, and, because he failed to make use of the faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are.

In *Mullen v. Beach Grove Park*, 64 Indiana 202, the Indiana supreme court says:

“An answer admitting the execution of the subscription sued upon, but alleging that the person procuring his signature had misrepresented the contents of the subscription and the extent of liability the defendant would incur by signing it, is insufficient.”

And we think this is peculiarly true where the evidence fails to show that the party is incapable of reading it, and where it does show that he had full and ample opportunities to investigate and determine its conditions, if he had so desired.

In *Fox v. Allenville Co.*, 46 Ind. 31, it is said:

“Statements by one procuring subscriptions for a creamery that the profits would be large are mere matters of opinion, and, even if false, do not constitute a defense to an action for the subscription.”

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In *Davis v. Campbell*, 93 Iowa, 524, the Iowa supreme court say:

"A statement, by persons taking a subscription to a railroad, that the road would be completed to a certain point by a certain day, are mere expressions of opinion, which, although not fulfilled, will not defeat a recovery on the subscription."

In *Sawyer v. Pickett*, 19 Wall. 146, the supreme court of the United States say:

"A representation as to the prospects of the railroad, and its probable effect on the value of property through or past which it runs, are matters of opinion, and will not constitute such fraud as will defeat a subscription to the stock of the road."

Nor do we think it can be contended that the evidence of these statements made at this public meeting by the various parties making the speeches there is admissible as the statements made by the agents of the company, or that the railroad company to whom this note is payable can be bound by their declarations, because an examination of the testimony of the defendant in error, on pages 90 and 91, will show that he is uncertain as to just who drew these notes, and in fact his final conclusion is that they were drawn by young Geo. Green, and there is nothing in the record or evidence to show that young Geo. Green made any statement of any kind or character as to who would build this road, or any of the representations which the defendant now claims he relies on as a defense. There is not the slightest evidence in the record to show that this meeting was ever called at the instance of the railroad company; but there is evidence, and all the evidence is to show that this meeting was called by the citizens themselves to secure a benefit to the town, and we are at a loss to see under what principle of law a written contract, plain upon its face, clear and unmistakable in its terms, and which clearly discloses all its conditions, can be changed, varied, or set aside by proof of statements made by parties which the evidence fails to show had any authority to bind the payee of the note, and when such statements were made, according to the evidence, prior to the signing of such note.

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Now, under this condition of the record, we think it was plainly the duty of the court to have sustained the demurrer of the plaintiff in error. It is true that the answer in this case contains a general denial, but this general denial does not constitute a defense to this action for two reasons, at least: First. This is an action upon a promissory note, purported to be signed by the defendant in the court below. The general denial is unverified. This, under our statute, does not place or put in question the signature to the note. The note was competent evidence, without further proof, under such a pleading. Second. While the general denial, if sworn to, would have put the execution of this note in issue, yet the second cause of action alleged is inconsistent with a general denial, in so far as it admits the execution of the note, for the second cause of action expressly admits the execution of the note, and in our judgment the allegations of the answer are not sufficient to constitute a defense in this case, and for this reason the court should have sustained the demurrer filed by the plaintiff in error in the court below. But, having failed to sustain this demurrer, and having submitted the question to a jury, and the jury having found in favor of the defendant, under the record and evidence in this case we think it was clearly the duty of the court to have set aside the verdict and granted a new trial. But, as all the defense is clearly set up in the answer and evidence, we think there is no necessity for a re-hearing of the case, and under the law as we understand it the plaintiff in this case should have judgment for the face of the note and interest, and the attorney's fees therein mentioned.

For these reasons, the case is reversed, at the cost of the defendant in error, with instructions to the district court to enter judgment for the plaintiff in accordance with this opinion.

Burford, C. J., who presided in the court below, not sitting; all the other Justices concurring.

J. W. Cordray v. Salia M. Cordray.

J. W. CORDRAY v. SALIA M. CORDRAY.

(Filed September 4, 1907.)

(91 Pac. 781.)

1. **PROCESS—Service by Publication—Strict Compliance With Statutes.** Where publication is relied on and jurisdiction is sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute.
2. **DIVORCE—Service by Publication—Affidavit—Case.** An affidavit in an action for divorce, as a basis for service for publication, in the following form: "Salia M. Cordray, being first duly sworn, upon oath says that she is the plaintiff in the above entitled cause, and that defendant, J. W. Cordray, is not a resident of the territory, but to the best of her knowledge and belief is a resident of and that service of summons in this case can not be had upon the said defendant in the territory of Oklahoma," does not comply with the provisions of the statute and a judgment rendered in such case is void for want of jurisdiction over the defendant.
3. **SAME.** Such affidavit is defective, first, in that it fails to state what, if any, diligence was used to procure personal service of summons upon the defendant; second, in that it fails to state the nature of the action; third, that it fails to state that at the time of the making of the affidavit the defendant was out of the territory of Oklahoma.

(Syllabus by the Court.)

Error From the District Court of Canadian County; Before Clinton F. Irwin, Trial Judge.

Reversed.

Joseph G. Lowe and J. J. Carney, for plaintiff in error.

Glitsch, Morgan & Glitsch, for defendant in error.

Opinion of the court by

PANCOAST, J.: This action was originally brought in the district court of Canadian county on November 12, 1902, by the de-

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defendant in error against the plaintiff in error, for divorce. On the day that the action was commenced the plaintiff filed her affidavit for service by publication. Publication service was made by publishing the notice in a newspaper. The case was heard on the 23rd day of February, 1903, the defendant making no appearance. The plaintiff was granted a decree of divorce and the custody of two minor children. The case remained in this condition until the 25th day of April, 1905, when the plaintiff in error appeared specially and filed his motion to vacate the judgment and decree of the court, for the reason, principally, that the court was without jurisdiction of the person of the defendant, because of the defects in the service. This motion was heard on the 13th day of December, and the motion denied. The appeal is taken from the order refusing to vacate the judgment.

The contention of the plaintiff in error is that the judgment and decree granting the divorce and custody of the children is a nullity. The principal question presented and argued by plaintiff is that arising out of the affidavit for publication. This affidavit reads as follows:

"Salia M. Cordray, being first duly sworn, upon oath says she is the plaintiff in the above entitled cause, and that defendant, J. W. Cordray, is not a resident of the territory, but to the best of her knowledge and belief is a resident of ———, and that service of summons in this case cannot be had upon the said defendant in the territory of Oklahoma.

"[Signed] "SALIA M. CORDRAY."

"Subscribed and sworn to before me this 12th day of November, 1902.

"[Seal]

J. E. JONES, Notary Public."

It is claimed that this affidavit is so defective and deficient that the court did not obtain jurisdiction of the defendant in this case. It is not seriously contended by the defendant in error that the affidavit is perfect, but it is claimed that it is not void, and, at most, only voidable.

Where publication service is relied on, and jurisdiction is

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sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and, in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute. Section 4276, Wilson's Rev. & Ann. St. 1903, provides that service may be made by publication in an action brought to obtain a divorce where the defendant resides out of the territory. Section 4377 also provides that, before service may be made by publication, an affidavit must be filed, stating that the plaintiff with due diligence is unable to make service of summons upon the defendant or defendants to be served by publication; and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication. It will be seen at a glance that this affidavit is defective; that it does not fully comply with the statute upon the subject. If it is so far defective as to not give jurisdiction of the defendant, it is void, and not voidable merely. If, however, it is only so defective as to be voidable, and not void, then the court obtained jurisdiction.

It is contended, however, that it is not only voidable, but void, first, for the reason that it fails to state that due diligence was used to procure personal service of summons upon the defendant; second, for the reason that it fails to state that the case was one of those mentioned in section 4276; third, that it fails to state that at the time of making the affidavit the defendant was out of the territory of Oklahoma. The affidavit is certainly defective in each of the provisions contended for. There is no statement whatever as to diligence used, much less any statement of facts showing diligence in attempting to obtain personal service, nor is there any statement whatever as to the nature of the action for which publication service was attempted to be had. While the affidavit states that, to the best of the knowledge and belief of the plaintiff, the defendant is a resident of——, and

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that service of summons in this case cannot be had upon the defendant in the territory, there is no showing that the defendant was not at that time personally at some point within the territory. The statement that to the best of the knowledge and belief of the plaintiff, if it relates to the question of the whereabouts of the defendant, is not sufficient, and the statement that service of summons cannot be had upon the defendant in the territory is not a statement of fact, but a conclusion.

This statute was adopted in this territory from the state of Kansas, and has been passed upon repeatedly by that state. Among the early cases is the case of *Shields v. Miller*, 9 Kan. 390, which was a foreclosure case. The affidavit in that case was somewhat of the same form and substance as the one at bar, and the court in passing upon the case makes the statement that, from anything that appeared in the affidavit, the defendant may have been in the county where the action was brought, or even upon the land in controversy when the affidavit was filed, and therefore might easily have been served with summons personally. The supreme court further says that: "The affidavit is the foundation upon which jurisdiction is obtained. The plaintiff has no power or authority to obtain service by publication until after he has filed the proper affidavit. Without the affidavit, the attempted service by publication is a nullity, and without valid service every subsequent proceeding, including the judgment, the execution, order of sale, and deed, must necessarily be void." Another case bearing upon the same subject is *Grouch v. Martin*, 47 Kan. 313, 27 Pac. 985. In this case the affidavit for publication failed to state that the action was one of those mentioned in the "preceding section." Also in the case of *Adams v. Baldwin*, 49 Kan. 781, 31 Pac. 681, the court held the same doctrine. Again, in the case of *Patterson v. Patterson*, 57 Kan. 277, 46 Pac. 304, being a divorce case, the court say that the affidavit would be insufficient where there was an entire want of any showing that the case was one of those mentioned in the "preceding section," which is section 78 of our

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code. That "the filing of an affidavit complying substantially with the terms of said section is a condition precedent to the obtaining of service by publication." Again, in the case of *Shields v. Miller*, 9 Kan. 390, and *Claypoole v. Houston*, 12 Kan. 324, and *Harris v. Claflin*, 36 Kan. 543, 13 Pac. 830, the court deals with this subject, following the former decision. In the last cited case the affidavit was held to be void. In *Lieberman v. Douglass*, 62 Kan. 786, 64 Pac. 591, the court holds that "the allegation in the affidavit that this is one of the cases mentioned in section 72 of the Code of Civil Procedure in the laws of the state of Kansas is not a statement of facts as is required in the affidavit, but a mere conclusion of law, and renders the affidavit wholly insufficient under the statute as a basis upon which constructive service can properly be predicated." The court holds in this case that the defect in the affidavit is fatal, and that the sheriff's deed and judgment were void by reason of such judgment. The affidavit in this case should have stated that this was an action for divorce. This allegation is entirely omitted, and under the numerous decisions of the supreme court of Kansas such allegation is held to be necessary, and a want of it is such a defect that no valid judgment can be rendered. Numerous cases in other states upon similar statutes have been decided, and the holdings are uniform with those from the state of Kansas. In the case of *Galpin v. Page*, 18 Wall. (U. S.) 350, the supreme court of the United States hold that "where the record states facts showing that a defendant is without the territorial limits of the court, and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is upon the party who invokes the benefit of protection of the judgment or decree."

So that, applying this rule, there can be no presumption in favor of the plaintiff below that the court acquired jurisdiction in any other way than as shown by the record in this case, and the burden was upon the plaintiff below to establish by the record

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a compliance with the statute for service by publication. This includes an affidavit showing the action was one for divorce, that the defendant was a nonresident of the territory, the facts necessary to show that due diligence was used to obtain personal service, and that the defendant, although a nonresident, was not within the limits of the territory. In addition to this, the burden was on the plaintiff to show that a copy of the petition had been mailed to the last known postoffice address of the defendant. In the syllabus of the case of *Galpin v. Page*, *supra*, the court lays down the rule that a strict and literal compliance with the statutory provisions is necessary; that where the procedure is not according to the course of the common law, but under a special statutory provision and special powers thereby conferred, which are exercised in a special manner, such powers are exercised over a class not within its ordinary jurisdiction, and therefore no presumption of jurisdiction would attend the judgment of the court. As stated in *Lewis v. Lewis*, 15 Kan. 181, these provisions with reference to publication service in divorce cases may be very inadequate, but they are worth something; and, whether adequate or not, it is the legislative direction, and, as such, must not be disregarded. They are precautionary measures calculated to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. Again, our own court, in the case of *Romig v. Gillette*, 10 Okla. 186, 62 Pac. 805, has spoken upon this subject as follows: "Where a party seeks to bring a defendant into court upon service by publication under the code, he must strictly comply with the provisions of the statute, and, unless this is done, the judgment will be void for want of jurisdiction of the person of the defendant." Again in *Rodgers v. Nichols*, 15 Okla. 579, 83 Pac. 923, this court has spoken in a manner which we think is decisive of this case.

From the conclusions which we have reached, we think that the district court erred in overruling the motion of the plaintiff in error to vacate the judgment, and for such error the decision of the court should be reversed.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

R. W. Higgins v. J. G. Street.

R. W. HIGGINS v. J. G. STREET.

(Filed September 4, 1907.)

(92 Pac. 155.)

TRIAL—Order of Proof—Discretion of Court. In an action for a balance due upon a written contract, where payment is not pleaded as a defense, the trial court at the beginning of the trial ruled that the burden of proof was upon the defendant, which ruling of the court was acquiesced in by both plaintiff and defendant without objection, and the defendant thereupon introduced his evidence, which tended to show a less indebtedness than that claimed by plaintiff. Held, that it was not material error thereafter for the court to admit proof by the plaintiff of the amount due upon the contract sued on.

(Syllabus by the Court.)

*Error from the Probate Court of Oklahoma County; before Wm.**P. Harper, Trial Judge.*

Affirmed.

*M. Fulton and J. S. Jenkins, for plaintiff in error.**Shartel, Keaton & Wells, for defendant in error.*

Opinion of the court by

GILLETTE, J.: This action was brought and tried in the probate court of Oklahoma county to recover the sum of seven hundred and seventy dollars, a balance alleged to be due upon a rental contract for real estate. The petition set out the lease, and the answer in the first paragraph denied every allegation contained in the plaintiff's petition. The second and third and fourth paragraphs contained allegations which confessed the contract and original liability thereunder, but presented grounds for the avoidance of liability for that part of the rent alleged to be due and unpaid. A trial was had in said court, wherein the defendant wholly failed to establish his grounds of defense, and judgment was entered for the plaintiff in the amount sued for. The answer of defendant was not verified, and the trial court, at the

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beginning of the trial, upon the question being presented, held that the burden was on the defendant, which was accepted by the defendant without objection. The proof offered by the defendant tended to show a less sum due and unpaid, for the time the property was occupied under the lease, than was claimed in the petition. After the testimony for the defendant was all offered, the plaintiff was called as a witness and was interrogated touching the amount due and unpaid thereon, to which the defendant objected upon the ground that it was too late in the procedure of that case for the plaintiff to be heard upon the question of the amount due, which objection being overruled, the defendant excepted and brings the case to this court with no other point involved.

Counsel for defendant in error in their brief object to the consideration of this case by this court for the reason, as they state, that the case-made nowhere contains a statement that it contains all the evidence, citing *Lumber Co. v. Lumber Co.*, 16 Okla. 90, 84 Pac. 1093. Without such an allegation, under the authority cited, the cause could not be considered; but, upon examination of the case-made, we find, upon the first page of what is denominated the case-made, the following provision:

"CASE-MADE.

"The following pages and record contains a true and correct statement of all the pleadings filed, orders made, evidence received, judgments entered, rulings, exceptions and proceedings had, from the beginning to the end of the cause, in case No. 2,130, styled J. G. Street, Plaintiff, v. W. E. Higgins, Defendant, in the probate court of Oklahoma county, O. T., and same is as follows:"

This we think a sufficient allegation of the fact that the record does contain all the evidence offered upon the trial of the case.

Touching the exception of the defendant to the rule of the court which authorized the plaintiff to introduce testimony in reference to the amount due and unpaid upon the lease, after the

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defendant had introduced his evidence, we think the defendant was not in position to present such objection and exception. The answer presented no question of payment, the general denial therein not being sufficient to present such an issue. See *Winton v. Myers*, 8 Okla. 421, 58 Pac. 634, where this court holds as follows:

“Payment is always matter of defense, and as a general rule must be specifically pleaded and proven by him who claims payment.”

Under the terms of the contract, the amount sued for was due unless payment had been made, and there was no plea of payment. Under this status of the case, when called for trial, the court ruled, upon the presentation of the question, that the burden of proof was upon the defendant, and the defendant without objection or exception assumed the burden and offered his testimony, which tended to show a less sum due on the contract than that claimed by plaintiff. The court thereupon, over the objection of defendant, permitted the plaintiff to go upon the stand and testify as to the amount due, which being established, the court entered judgment for it. In this we are unable to perceive reversible error.

The judgment of the lower court is affirmed.

Garber, Irwin, and Hainer, JJ., absent; all the other Justices concurring.

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R. W. HIGGINS v. J. G. STREET.

(Filed September 4, 1907.)

(92 Pac. 153.)

LANDLORD AND TENANT—Breach of Lease—Abandonment—Remedies of Landlord. If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may, at his election, at once enter and terminate the contract and recover the rent due up to the time of abandonment, or he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages.

(Syllabus by the Court.)

Error from the Probate Court of Oklahoma County; before Wm. P. Harper, Probate Judge.

Affirmed.

M. Fulton and J. S. Jenkins, for plaintiff in error.*Shartel, Keaton & Wells*, for defendant in error.

STATEMENT OF CASE.

The defendant in error, Street, leased the Alamo Hotel in Oklahoma City, by written lease for a term of one year at a rental of \$200 per month to the plaintiff in error, Higgins, and his associates. Higgins, with the consent of Street, sublet the hotel to Mrs. Tedford, who occupied it for a few months and paid the rent to Street, except \$50 which was paid by Higgins at one time when she was in default. Street consented to the subletting, but refused to accept Mrs. Tedford as his tenant or to release Higgins from payment of the rent. When Mrs. Tedford paid him rent, he receipted Higgins for the rent and gave him credit for it. Mrs. Tedford vacated the hotel before the lease expired, and notified both Street and the agent of Higgins that she had vacated the property. Higgins was in California and had left his business in the hands of his attorney, M. M. Fulton, of Oklahoma City.

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Mrs. Tedford notified Fulton when she left the building, and Street notified Fulton that he would hold Higgins for the rent. Higgins was notified by Fulton, but took no action in the matter. Street then took possession, made some necessary repairs, and leased the hotel on account of Higgins for \$125 per month and gave him credit for this amount each month during the unexpired term.

This action is by Street to recover from Higgins on the original lease the rent for the time the building was unoccupied after Mrs. Tedford vacated it and the difference between the amount Higgins agreed to pay and the amount received from the last lessee for the unexpired term of Higgins' lease, together with some expenses incurred in repairs and in reletting the premises. Issues were formed, and the case tried to a jury, and verdict returned in favor of Street for the amount claimed by him. Judgment was rendered on the verdict, and, after motion for new trial was overruled and exceptions saved, Higgins appeals to this court.

Opinion of the court by

BURFORD, C. J.: The question of law involved is whether the action of Higgins, after the property was vacated by his subtenant, amounted to an abandonment of the lease, and the action of Street, in repairing and reletting the property to another tenant, constituted either an eviction or an acceptance of the surrender of the lease. Higgins makes both contentions: first, that the lease was surrendered at the time Street consented to the subletting to Mrs. Tedford; and, second, if the lease was not surrendered, that the action of Street in taking possession and subleasing the property constitutes an eviction—in either of which cases he would not be liable for rents after the happening of such event. These questions both depend upon the particular facts in the case. Where a tenant abandons the premises, the landlord may at his election consent to the surrender, enter and terminate the contract, and recover the rent due up to the time of the aban-

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donment; or he may suffer the premises to remain vacant, refuse to consent to a surrender, and sue on the contract at the end of the term for the entire rent; or he may give notice to the tenant of his intention to hold him for the rent, and sublet the premises for the benefit of the lessee for the unexpired term, and give him credit for the rent received to reduce his damages. It is this last rule that Street attempts to invoke in this case. While Higgins seems to have stood upon the assumption that by leasing the hotel to Mrs. Tedford, and having Street consent to such subletting, he was released from further liability, that there was a surrender of the lease. In our judgment the uncontroverted testimony shows that there was neither a surrender or an eviction. Street made no agreement to release the lessee at the time Mrs. Tedford went into the building. The lessees assigned their contract to her, but Street refused to accept her as his tenant and refused to release the lessees from the payment of the rent. He took what rent she paid, receipted to her in the name of Higgins, and gave Higgins credit for the amounts paid by her. He told her, and she communicated the statement to Fulton, that he was looking to Higgins for the rent, and for that reason made out the receipts to Higgins and delivered them to her. In order to constitute a surrender there must be shown a mutual agreement between the lessor and lessee. A lease in writing constitutes a written contract, and the lessee cannot surrender it or be released from its terms without the consent of the lessor, and it is absolutely essential to the termination of the term that both the lessor and the lessee agreed to the surrender; and, when this is shown, the tenant is no longer liable. *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Bourdercaux v. Walker*, 78 Ill. App. 63; *Milling v. Becker*, 96 Pa. State 182; *Lane v. Nelson*, 167 Pa. State 602, 31 Atl. 864; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713; *Livermore v. Eddy*, 33 Mo. 547; *Detroit Pharmacal Co. v. Burt*, 124 Mich 220, 82 N. W. 893; Jones on Landlord and Tenant, sec. 539.

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Was there an eviction? A number of the authorities hold that if the tenant leaves the premises vacant or unoccupied, and the landlord enters without his consent and relets the premises, such action constitutes an eviction of the tenant and terminates the lease. And, in the absence of any other circumstances, such is the law. But there is another rule as well established and of as extensive application. In *Jones on Landlord and Tenant*, a recent work by an able author, the rule is stated as follows: sec 549: "After an unauthorized abandonment by a tenant, the landlord may, by taking proper precautions, relet to another without creating a surrender by operation of law; but he is not bound to do so. In a recent case it was said: 'The rule sanctioned by the decided weight of authority, if, indeed, there can be said to be a diversity of opinion on the subject, is that the landlord may, in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damages will be the agreed rental less the amount realized on account of such reletting, or he may permit the premises to remain vacant until the end of the term and recover his rent in accordance with the terms of the lease.' Although the landlord may relet for the benefit of the lessee and on his account without releasing him from his undertakings, such acts, if unexplained, would amount to a surrender by operation of law, as in a case where the lessor accepted the surrender."

In *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639, this identical question was involved under a lease which provided that if the lessees, at any time during the term, should fail to perform either of the promises or covenants, the lease should terminate and be at an end, and the court held that such covenants were for the benefit of the lessor only, and that the lessee could not, by failure to perform the conditions of his lease, abrogate the contract and thus secure the advantage of his own default, and that the landlord had a right to take possession and lease to another tenant for the purpose of reducing the liability of the original tenants, and

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such action would not create a surrender by operation of law. In *Brown v. Cairns*, 107 Iowa 727, 77 N. W. 478, the question is very fully discussed and the authorities cited supporting the rule stated in Jones, *supra*. To the same effect are: *Nerrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Bowen v. Clarke*, 22 Or. 566, 30 Pac. 430; *Scott v. Beecher et al.*, 91 Mich. 590, 52 N. W. 20; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Humiston, Keeling & Co. v. Wheeler*, 70 Ill. App. 349; *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967; *Meyer & Co. v. Smith*, 33 Ark. 627; *Ledoux v. Jones et al.*, 20 La. Ann. 539; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. (N. C.), 713; *Gerhart Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *Auer v. Penn.* 99 Pa. State, 370; *Alsop v. Banks*, 68 Miss. 664, 9 So. 895; *Stewart v. Sprague*, 76 Mich. 184, 42 N. W. 1068.

We think the facts of this case come within the rule last stated. Higgins had gone to California and left his sublessee in possession of the hotel. During his absence she vacated the building. It required attention; the insurance was about to be invalidated. Street made it known to the attorney and agent of Higgins that the property must be occupied; that he would continue to hold Higgins for the rent. The property remained unoccupied for over a month. Street had a watchman to stay about the property of nights to protect it. Higgins had for all practical purposes abandoned the lease; he was paying no rent, and Street then made some necessary repairs, advertised the property for rent, and finally through a rental agent procured a tenant for the unexpired portion of the term and gave Higgins credit on account for the rent received. Higgins came home before the tenancy expired, made no claim for the property, and made no objections to the subleasing by Street. It cannot be said that Street evidenced any purpose to evict the lessees or to release them from their obligations. Upon the other hand, the circumstances all show that he was studiously trying to avoid releasing them, was

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trying to preserve the property and lighten their damages as much as possible.

The plaintiff in error submitted certain special questions to the jury to be answered under oath, upon which they specifically found that Fulton was the agent of Higgins during the absence of Higgins, and charged with the control of the property, and that Street notified Fulton of his intention to re-enter the property and lease it on account of Higgins on the original lease. We think the evidence supports the verdict of the jury, and that there is nothing in the special findings in conflict with the verdict.

The plaintiff in error objects to some of the instructions given by the court. The instructions were in writing, and consist of several separate specific propositions, covering the entire law of the case. The only exceptions taken are as follows: "Defendant excepted to the instructions given the jury by the court." This was not a sufficient objection. *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944. *McCabe & Steen Const. Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320.

The defendant presented four separate requests for instructions to the jury, each of which was refused, and this refusal is alleged as error. The first request is in direct conflict with the rule of law we have stated herein, and it was properly refused. Request No. 2 is also in conflict with the rule that a landlord may, under any conditions, re-enter and lease the premises for the benefit of the lessor. Request No. 3 is embraced in and entirely covered by the general instructions given by the court. Request No. 4 is also in conflict with the principle we have adopted in this opinion. There was no prejudicial error in refusing these requests.

The only other contention of plaintiff in error is that the court erred in permitting the plaintiff, Street, to testify as to what his purpose or intention was in taking possession and re-letting the property. We think this was competent testimony. His purpose or intention was a material question in relation to

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his action in taking possession of the vacant property before the expiration of the lease, and, where it is proper to inquire into or determine the intent of a person, it is proper to permit such person to testify as to his intent.

We find no error in the record. The case appears to have been tried fairly and impartially, the evidence is sufficient to support the verdict, the instructions fairly and fully state the law, and the judgment should be affirmed.

The judgment of the probate court of Oklahoma county is affirmed, at the costs of the plaintiff in error.

Irwin, J., absent; all the other Justices concurring.

THOS. NOLAN V. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *a Corporation.*

(Filed September 4, 1907.)

(91 Pac. 1128.)

1. **ATTORNEY AND CLIENT—Authority of Attorneys—Judicial Notice.** In this territory, attorneys at law receive their license, and are authorized by the supreme court to engage in the practice of the law, and to transact business as attorneys at law, and the courts of the territory will take judicial notice of the fact that one appearing and acting as an attorney is or is not duly authorized.
2. **SAME—Scope of Authority.** Any duly authorized attorney may, after the subject matter has been placed in his hands, give any notice affecting the substantial rights of his client which the client himself might have given, and those affected by such notice must take notice of it.
3. **SAME—Dispute of Authority—Burden of Proof—Presumptions.** Where notice material to the maintenance of a suit has been given by an attorney, those disputing the authority of the attorney and who rest their defense, in an action based thereon, upon the fact that they dispute the attorney's authority to give important notices, must maintain such defense in court, for a court of record in Oklahoma will presume that an attorney admitted to the practice is acting in all matters affecting his client's rights, with authority from the client he represents.

(Syllabus by the Court.)

Thos. Nolan v. St. Louis & San Francisco R. Co.

Error from the District Court of Grant County; before James K. Beauchamp, Trial Judge.

Mackey & Mackey, for plaintiff in error.

Flynn & Ames, for defendant in error.

Opinion of the court by

GILLETTE, J.: This action was commenced in the probate court of Grant county, to recover possession of a portion of the depot grounds and right of way in the town of Lamont, in said county, which at the time of bringing said action, to-wit, June 2, 1905, and from the 28th day of April, 1903, had been occupied by defendant under and by force of a license from the plaintiff, which license provided that it should terminate on sixty days' notice by the plaintiff railroad company, and provided that the defendant on receiving such notice should at once vacate such premises. The license was signed by both plaintiff and defendant. On the 18th day of March, 1905, the agent of the plaintiff at Lamont served a notice upon the defendant terminating said lease within sixty days from the date of such service, describing the premises, and requesting defendant to remove therefrom and give possession of the same, which notice was signed: "St. Louis & San Francisco R. R. Company, by Flynn & Ames." The defendant failed to vacate the premises at the expiration of sixty days, and on the 27th day of May, 1905, the agent of the company at Lamont served another notice upon the defendant, such as required by the statute to be given prior to the commencement of the action of forcible entry and detainer, and which notice demanded the immediate vacation of the premises, or suit for such possession would be commenced within three days, which notice was also signed by the St. Louis & San Francisco Railroad Company, by Flynn & Ames, its attorneys. The defendant continuing the occupancy of the premises notwithstanding the foregoing notices, suit was brought therefor in the probate court of Grant county and tried on the 24th day of June, 1905, result-

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ing in a judgment for plaintiff and for the restitution of the premises above described. Thereupon the defendant appealed said cause to the district court, where the same was retried February 27, 1906, by a jury, resulting in a verdict and judgment in favor of the plaintiff, and defendant brings the case to this court predicated error upon the rule of the trial court, because of the overruling by said court of a motion for a new trial, which motion was upon the ground: First, that the verdict and judgment is not sustained by sufficient evidence and is contrary to law; second. error of law occurring in the trial and executed to by the defendant.

Only one ground of error is now complained of in the trial of this case. The plaintiff upon the trial offered in evidence the written notice to terminate the lease, to the introduction of which defendant objected, and at the time excepted to the ruling of the court admitting the same, the point being that the notice terminating the lease was signed: "The St. Louis & San Francisco Railroad Company, by Flynn & Ames, its attorneys." That at the time said notice was served, and upon the trial of the cause, there was no proof offered that Flynn & Ames were attorneys of the plaintiff and authorized to give the notice. No evidence was offered upon the trial by the defendant, and the record shows that, when notice to terminate the lease was served, he at that time made no objection to the form or sufficiency of the same. No authority bearing upon the point involved is presented by the briefs upon either side, and the writer of this opinion has been unable to find any.

The license to the defendant, and by force of which he occupied the premises, provided that it could be terminated by the railroad company on sixty days' notice.

Without notice, therefore, by the railroad company sixty days prior to the bringing of this action, the company had no cause of action against defendant, Nolan. Such notice was, however, served upon the defendant by the company's station agent at

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Lamont. It was signed, "St. Louis & San Francisco Railroad Company, by Flynn & Ames, its attorneys." Was this sufficient, in the absence of specific proof, of their authority to act in this respect?

The word "attorney" as used in this case means an attorney at law, and an attorney at law in this territory is an officer of the court, authorized to appear therein, and as such present to the court for its consideration the interests of his client, as well as to appear generally for his client with reference to the transaction of business usually confided to members of the legal profession, and are before being authorized to appear in court or to do business as an attorney at law, required to prove their qualification and to take an oath that in the transaction of business as attorneys they will do no falsehood nor consent that any be done in court, and will not knowingly promote, sue, or procure to be sued any false or unlawful suit. These requirements of the law have given to attorneys, admitted to the practice of the law, a status before the courts, and with reference to business they assume control of, different from that of other agents. A presumption follows their act, when acting for another, that they are authorized by such other to act for him touching the particular subject-matter. Attorneys admitted to the practice in Oklahoma obtain such right through and by reason of the authority of the supreme court, and the courts of the territory may therefore properly take notice of the right of an individual to act as an attorney at law, and to presume that in so acting they are not prosecuting any false or unlawful suit.

If Flynn & Ames, as attorneys at law, had without authority of the railroad company undertaken to cancel the license by which the defendant held possession of the premises, their act would have been a violation of their oaths as attorneys. The court upon the trial of the cause could not and would not assume that they had so acted. On the contrary, it would hold that their authority is presumed until some step was taken which would

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challenge that presumption. No such step was taken in this case, and we think the court did not err in the admission in evidence, over the objection of counsel for defendant, the notice of the termination of the lease in sixty days, signed, "St. Louis & San Francisco Railroad Company, by Flynn & Ames, its attorneys;" for the presumption would be in such case that they were the company's attorneys and authorized to act in that respect.

The judgment of the lower court is affirmed.

Irwin, J., absent; all the other Justices concurring.

J. W. SPARKS V. OKLAHOMA CONSTRUCTION COMPANY, *a Corporation.*

(Filed September 4, 1907.)

(91 Pac. 839.)

1. **BILLS AND NOTES—Action—Pleading—Public Policy—Railroad Bonus.** A petition praying for judgment upon a promissory note containing a provision showing that it was executed in consideration of the benefits arising to the maker by reason of the construction of a railroad from a given place to another place named, by a time stated, and which is made payable to a construction company, without naming the railroad to be built, or any railroad company as an interested party, does not present such a question of public policy as to make such petition demurrable upon that ground.
2. **SAME—Answer—Burden of Proof.** Where, in an action upon a promissory note which sets forth as the consideration thereof the construction of a railroad to a given point by a given time, an answer is filed setting up a distinct contract providing for the conveyance of real estate as the consideration for the execution and delivery of said note, and where the reply to such answer denies under oath the execution and delivery of such contract, the burden of proving the execution and delivery thereof is upon the defendant, and a failure to prove the execution and delivery of such contract precludes its being received in evidence, and is a failure of that ground of defense.

(Syllabus by the Court.)

J. W. Sparks v. Oklahoma Construction Co.

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Snoddy & Son, for plaintiff in error.

Dale & Bierer, for defendant in error.

Opinion of the court by

GILLETTE, J.: This action was begun in the district court of Woods county, June 30, 1904, by defendant in error to recover from the plaintiff in error upon two promissory notes aggregating the sum of \$100, the first of which is Exhibit A to the petition, and reads as follows:

"No. 140 \$25.00 Enid, O. T., April 13, 1901.

"On or before September 1, 1901, for value received, I promise to pay to the Oklahoma Construction Co., or order, the sum of \$25.00, with interest from maturity at the rate of ten per cent. per annum. This note is made in consideration of the benefits accruing to me from the construction and operation of a railroad from the town of Blackwell, O. T., to and into the town of — located upon the — quarter of section 32, in township 21 north, of range 9 W. I. M., and the erection of a depot and yard facilities thereat. —

"Now, if said railroad is built and in operation on or before the first day of August, 1901, this note shall be in full force and effect, but if said railroad is not built as above provided, this note shall be null and void. And to secure the payment hereof I hereby give and grant to the Oklahoma Construction Company, or its assigns, a lien upon an undivided interest to one red and white cow, 8 years old, now situated upon the southeast quarter of section 34, town 21, range 9 W. I. M., equal to — bushels of —.

"J. W. SPARKS.

"In the presence of C. C. Arel."

The second note for \$75 was of like tenor and effect, dated at Enid, O. T., May 6, 1901, and designated the town of Hoyle, located upon the southwest quarter of section 32, town 21 north, of range 9 W. I. M., as the point to which said road was to be built by Aug. 1, 1901. The answer filed, after a demurrer to the petition had been overruled, was first a general denial of the alle-

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gations of the petition, except such allegations as were expressly admitted, but denied that the railroad was built and in operation as required by the terms of the note, and alleged that there was no depot erected or yard facilities provided on said quarter section of land the first day of August, 1901. The defendant, further answering, stated that the notes were based upon an illegal agreement and contract, in that, in addition to the location of the depot and yard facilities at the point mentioned, there was an agreement by which the plaintiff agreed to deliver to the defendant deeds conveying three lots in Ames, Woods county, Oklahoma, which were to be determined by lot or drawing therefor, which agreement was as follows:

“Enid, O. T., 4-26, 1901.

“In consideration of the execution and delivery of a certain promissory note made by J. W. Sparks and payable September 1, 1901, to the Oklahoma Construction Company, or order, and conditioned for the construction of a certain line of railroad mentioned in the written condition to said promissory note annexed, said Oklahoma Construction Company hereby certifies that said J. W. Sparks is entitled to receive a good and sufficient deed of conveyance to three lots in the town of Ames, Woods county, Oklahoma, conveying to said J. W. Sparks good title to such lot free and clear of all lien or incumbrance, the location of said lot in said town to be determined by lot or drawing therefor, between all parties entitled thereto. And said Oklahoma Construction Company hereby guarantee the due execution and delivery of such deed of conveyance upon the determination by lot as aforesaid, and the payment of said promissory note.

“THE OKLAHOMA CONSTRUCTION COMPANY,
“By T. S. CHAMBERS, its agent.”

A second contract of like tenor and effect was executed and delivered May 31, 1901, for one lot. The answer further alleged that there was more than 1,000 lots in the town of Ames of the value of from \$1 to \$300, and that defendant had demanded before suit was brought a deed conveying a lot in the town of Ames, which was refused. The defendant, for a further defense, declared the plaintiff to be the owner of the land platted as a town

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site, and through its officers informed the defendant that, unless it could sell four hundred lots in said town site, no depot or yard facilities would be located there, and the defendant, being desirous of having such depot and yard facilities there, executed and delivered to the plaintiff said notes, for which he was to receive four lots in consideration of his notes, and which had never been tendered or offered to him, and conveyance of the same had been refused. In reply, the plaintiff denied the allegations of the defendant's answer which in any way denied the plaintiff's right of recovery, and, for a further reply, denied the authority of T. S. Chambers, as agent of the plaintiff, to make and deliver on behalf of the plaintiff the contract to convey lots, and denied that Chambers was an agent of the plaintiff, which denial was verified by the president of the plaintiff. Upon the issue so framed the case was tried June 1, 1905.

The first assignment of error presented by the brief of plaintiff in error is the overruling, by the trial court, of the demurrer to the petition and objections to the introduction of testimony, citing, in support of such contention, *Enid Right of Way and Town Site Co. v. Lyle*, 15 Okla. 318, 82 Pac. 810. *McGuffin v. Coyle and Guss*, 16 Okla. 648, 85 Pac. 954, 86 Pac. 962; and *Piper v. Choctaw Northern Town Site and Improvement Co.*, 16 Okla. 436, 85 Pac. 965. The plaintiff in error in his brief says: "The petition shows affirmatively that the instruments sued on were illegal contracts, and that they were void, being against public policy. They showed that the promise to pay was made, not to the railroad company, but to a third party." There is nothing in the petition which justifies this statement. The notes sued on were plain promissory notes, payable to the defendant in error, and recite a particular consideration therefor, which was the building of a railroad by the defendant in error as stipulated, and the petition averred full compliance with such consideration. There was no third party mentioned. There was no railroad named to be influenced. There is nothing in the petition or contract which

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shows that any particular railroad company or official was to be or might be influenced by it. It was simply a contract to pay so much money when a certain thing was done, and the petition averred a full compliance with the terms of the agreement. To have held the demurrer good it would have been necessary for the court to have read into the petition and contract sued on what was not there written, and which could not be legally presented in considering the demurrer. The authorities cited are not applicable. In *Enid Right of Way and Town Site Company v. Lyle*, the company agreed, in consideration of \$75 to secure the location of a depot on the line of the Denver, Enid & Gulf Railroad at a point named, which amount was to be due and payable to the company when its road was constructed to the point named. In *McGuffin v. Coyle & Guss*, McGuffin contracted to pay Coyle & Guss in consideration of the Atchison, Topeka & Santa Fe Railroad building a line of railroad to Cushing, Okla., by a time fixed; while in *Piper v. Choctaw Northern Town Site & Improvement Co.*, the contract was with the Watonga & Northwestern Railroad Co., and was given as a matter of inducement to the building of that company's line of road to Watonga. In this last-named case, the contract was held valid and enforceable. In the other two cases, the contracts were held invalid and not enforceable. In the case under consideration the contract was executed and made payable, as stated, in consideration of benefits to be derived by plaintiff in error from the construction of a line of railroad and the location of a depot and yard facilities at a point named, and was not therefore a contract in consideration of some third party doing the thing contracted to be done; nor was any third party by the terms of the contract to be influenced to do the thing desired. There was no room therefore in the allegations of the contract or petition for the court, upon considering the demurrer, to conclude that the contract was void upon the ground of being against public policy. If it was void for such reason, it would be necessary to show sufficient fact to that end by answer. The

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line of road to be built was from Blackwell, Okla., to Hoyle, Okla. The ownership of the road is not disclosed by the contract sued on, if there was an owner of the same at the time, and the contract by its terms and tenor appears to be simply an inducement to such construction. This was the controlling consideration of the court in the case of *Piper v. Choctaw Northern Town Site and Improvement Co.*, *supra*, wherein an obligation to pay \$250 was held to be payable to the company building the road; such sum having been offered as an inducement to build the line of road by a time specified to a point designated. The demurrer having been overruled, as we think, correctly, the defendant answered as hereinbefore stated. No question of the non-enforceable character of the instrument sued on, upon the ground of public policy, was presented by the answer.

To a more complete understanding of the questions the trial court had before it to consider in the trial of the cause and upon the introduction of the testimony, we will recapitulate the defenses set up in the answer of defendant to the contracts sued upon. The execution and delivery of the contract was admitted, but it was alleged that the railroad was not built or in operation August 1, 1901, and that no depot and yard facilities had been established at the point required by the contract. This was the only defense stated in the answer touching the particular provisions of the contract sued on.

A second and further defense was pleaded based upon a separate contract purporting to have been given by the construction company to defendant, which by its terms provided for the execution and delivery to defendant of four lots in the town of Ames, Okla., (a changed name for Hoyle), to be selected by lottery, which deeds, it was alleged, had never been executed, and execution of them upon demand therefor had been refused. Touching the direct defense stated, that the railroad was not built with depot and yard facilities on August 1, there was presented simply a question of fact, to which much testimony was addressed and

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from which it appears that the road was constructed to the point required on the day required, and much evidence was offered upon the question as to whether or not a depot and yard facilities was on that day provided at that point. On behalf of the plaintiff, it was contended that a temporary depot was, at the time, provided, and that the plaintiff was at that time ready with depot facilities to discharge the business incident to the operation of a line of railroad, and that an agent had been supplied for that purpose. The conflicting testimony in this respect was settled by the general finding of the court that the road was constructed and in operation at the time and place required by the contract. A more perfect construction would, no doubt, follow with the lapse of time and necessity therefor; but that the road was constructed and fixed permanently at that point at that time there can be no question, and this probably was the only requirement of the contract, although it is specified in the contract, as a part of the consideration therefor, that a depot and yard facilities should be built, but the date upon which the depot and yard facilities should be built is not specified. Touching the second ground of defense, to-wit, the conveyance of lots, it is shown that two contracts were executed; the first for three lots, thirteen days after the execution of the first contract sued on, and the second for one lot twenty-five days after the second note sued on was executed. In fact, the dates of the instruments themselves show this to be true. As to the date of the delivery of the instrument sued on and the delivery of the instrument set out in the answer, or whether or not there was a simultaneous delivery of each of such instruments, the record is silent. Numerous questions were asked tending to develop this fact, but under the rule of the court such questions were not answered. Exceptions were taken to the ruling of the court in this respect. The order of the court was based upon the fact that the instruments sued on were each a complete contract requiring no explanation because of ambiguity, and expressed a consideration moving therefor. It is true that a written instru-

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ment may be varied by an instrument in writing or by an executed parol agreement. Here it was sought to vary a written agreement by an instrument in writing, to wit, Exhibits A and B, to the answer. The execution and delivery of these instruments were not admitted; in fact, their execution and delivery by plaintiff were denied under oath in the reply to the answer, as well as the authority of the person purporting to have executed the same. This status placed the burden upon the defendant to show that the written instruments presented by the answer were obligations of the plaintiff, and, until such fact was established, they could not, under the denial of the reply, be received in evidence or brought forward as contracts varying the terms of the written instrument sued on, and the rule of the court excluding them and any evidence touching their terms and tenor, until authority for their execution was shown, was correct.

No attempt was made to show that such instruments were executed or delivered by authority of the plaintiff, or to show that one T. S. Chambers, by whom they were signed, was either an officer or agent of the plaintiff, or had power or authority to execute or deliver the same. This lack of necessary evidence on behalf of the defendant to bring the instrument relied upon before the court for consideration was sufficient to exclude the same as evidence or proof of their contents. With such failure of proof on behalf of defendant, the entire ground of defense based upon such instruments was lost to the defendant, which left his defense standing alone upon the proposition that the road was not constructed in time and in accordance with the instrument sued on, and, as we have observed, such issue of fact was determined by the trial court upon conflicting testimony, which under the rule of this court cannot be disturbed.

The judgment of the court below must therefore be affirmed, with costs.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

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BLACKWELL, ENID & SOUTHWESTERN RAILWAY COMPANY AND ST.
LOUIS & SAN FRANCISCO RAILROAD COMPANY V. J. J. BEBOUT.

(Filed September 4, 1907.)

(91 Pac. 877.)

1. **EMINENT DOMAIN—Procedure—Entry on Land—Remedies of Landowner.** The statute of Oklahoma authorizing railroad corporations to exercise the right of eminent domain and providing the procedure by which the damages to the landowner may be ascertained and giving to the owner of the property as well as the corporation the right to institute such proceedings, does not provide an exclusive remedy, but the common law remedy afforded the owner in such cases may be pursued, at the election of the landowner, where his property is entered upon and appropriated for railway purposes.
2. **ABATEMENT—Eminent Domain—Pendency of Proceedings—Bar to Recovery of Damages by Suit.** Where condemnation proceedings have been instituted for the purpose of ascertaining the rights of the parties for the appropriation of right of way by a railroad company and of fixing the compensation of the landowner, such landowner cannot maintain an action at law to recover damages for the injury done to his property, and if such suit is brought it should be dismissed at the plaintiff's costs.
3. **SAME—Rights of Parties—Election of Remedies.** After a railroad company has entered upon private lands and appropriated its right of way, either with or without the consent of the owner, either party may institute condemnation proceedings to determine the relative rights of the parties and ascertain the damages sustained by the owner of the property, or the landowner may sue for damages.
4. **APPEAL—Verdict—Presumptions—Inclusion of Interest.** Where the person in whose favor a verdict is rendered is entitled to interest, and there is nothing in the record from which it can be determined whether or not the jury took into consideration the matter of interest in fixing the amount of their award, it will be presumed that they included interest.
5. **SAME—Judgment to Conform.** The judgment of the court must follow the verdict, and where the verdict is general and for a sum in gross and the question of interest was not reserved by the court, and there is nothing in the record to indicate that the jury omitted interest, it will be presumed that it is embraced in

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the amount of their finding, and the court cannot add interest to the amount found by the verdict of the jury.

6. **APPEAL—Review—Determination.** Where there is no error in the amount fixed by the verdict of the jury, and the judgment is erroneous as to amount and as to the taxation of costs, this court will not grant a new trial, but will vacate the erroneous judgment and enter in this court the judgment which the trial court should have rendered.

(Syllabus by the Court.)

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Modified.

Flynn & Ames, Jesse J. Dunn, and Dale & Bierer, for plaintiffs in error.

A. C. Town, for defendant in error.

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BURFORD, C. J.: The defendant in error was the owner of the southeast quarter of section 28, township 20 north, range 10 west, in Woods county, Oklahoma. The Blackwell, Enid and Southwestern Railway Company, without his consent, and before commencing any proceedings to acquire a right of way, constructed its railroad across said tract and appropriated a portion of it for its right of way, and subsequently leased or transferred its property to the St. Louis and San Francisco Railroad Company. After the strip of land for right of way had been taken and was being used for railway purposes, the Blackwell, Enid and Southwestern Railway Company instituted proceedings for condemnation of said strip for its right of way and for the assessment of damages. Commissioners were appointed and made the assessment and filed a report, fixing the damages at \$275. In these proceedings the land was described in the notice, the application for appointment of commissioners, and the report of the commissioners assessing the damages, as the southwest quarter, when it should have been the southeast quarter. the land in controversy. The appraisers were sworn by a United States commissioner, an officer not authorized to administer oaths

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in such matters. These proceedings were all corrected by amendments by leave of the court, and a new report properly sworn to filed by the commissioners on September 21, 1903.

In order to acquire the right to bind the land owner in condemnation proceedings, the court must have jurisdiction of the property to be condemned, and also of the owner. In our judgment the proceedings in this case were so defective that the jurisdiction of the subject-matter was not acquired until the filing of the amended and completed report of the appraisers and the amendment of the notice and application to the court for the appointment of viewers, which was all done on the 21st day of September, 1903. Bebout, the land owner, had made his written demand for a jury trial prior to this date, and also refiled the original demand on said date. He had thirty days from the filing of the report of the appraisers in which to file his demand for a jury trial. In view of the failure to describe the land in either notice the application or the report of the commissioners, and the failure of the commissioners to take any oath either before or after making the assessment and award of damages, we are satisfied that his time did not begin to run until the amendment and perfecting of the proceedings on September 21, 1903; hence his demand for a jury trial was in time, and there was no error in allowing a jury trial upon the issue of the amount of compensation to be awarded the land owner.

The condemnation proceedings were initiated by the Blackwell, Enid & Southwestern Railway Company by service of the original defective notice upon Bebout upon the 20th day of December, 1902, and from that date to the time of trial various steps were taken in court looking to the completion and confirmation of the proceedings. On November 8, 1902, Bebout filed in the district court of Woods county his petition against the Blackwell, Enid and Southwestern Railway Company, and also the St. Louis and San Francisco Railroad Company, claiming damages for the right of way of said roads across his land. Four several summonses were

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issued, and an attempt made to serve the defendants, but the first three were successively set aside by the court upon special appearance and motion of the defendants. The fourth summons, which was finally served upon the defendants, was issued December 8, 1903, and served on the 10th day of December, 1903. The defendants appeared and pleaded to the petition, and, among other defenses, set up the pendency of the condemnation proceedings in the same court, to have the damages ascertained for the same causes. The reply was a general denial. On February 3, 1905, the Blackwell, Enid and Southwestern Railway Company served upon Bebout an offer to confess judgment for the sum of \$550, and filed the same in court on the same day. On February 7, 1905, the court, by special order with consent of all parties, consolidated these two cases and ordered them tried together. The consolidated case was tried to a jury and a verdict returned assessing damages in favor of Bebout for the sum of \$480. Afterwards, on February 24, 1905, the court rendered judgment on the verdict for the sum of \$589.20, which was the amount of the verdict, \$480, plus \$109.20, which the court allowed and added as interest from the date of the appropriation of the land by the railway company to the date of the trial. The plaintiffs in error objected to the allowance of any interest by the court, and subsequently moved to modify the judgment and for a new trial; all of which were overruled by the court, and exceptions saved. It appears from the record in this case that the Blackwell, Enid and Southwestern Railway Company went upon the land in controversy and constructed its road across a portion of the tract prior to the time that any proceedings were begun to have determined the compensation of the land owner. Subsequently, and before the land owner had begun any proceedings to recover compensation, the railway company instituted the condemnation proceedings which resulted in an award of \$275 and the deposit of that sum in court for the use of Bebout. It was urgently contended by the company that Bebout had waived his right to a jury trial by having failed to file his demand for a jury

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trial within thirty days after the commissioners had filed their first report; but, as we have already said, the proceedings were so defective that jurisdiction by the court was not acquired of the subject-matter until the amendments were made inserting the correct description of the land, and the filing of the last report of award, which all appears to have been done on the same day. Bebout appeared to these amended proceedings and demanded a jury trial, which was allowed him. During the pendency of these proceedings he instituted his independent suit against both of the railway companies for damages, and issues were formed involving the identical questions in controversy in the condemnation case. It was contended in the court below, and also here, that the land owner was not entitled to maintain this independent suit for damages, but that his remedy was by the statutory proceedings for ascertaining the damages in such cases, and the determination of this question practically controls all other questions in the cause.

Our statute relating to the rights, powers and duties of railway corporations, among other provisions, contains the following (sec. 109, art. 9, chap. 18; Wilson's Rev. and Ann. St. 1903, sec. 1038): "Every railroad corporation incorporated under this act and any railroad corporation authorized to construct, operate or maintain a railroad within this territory, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine shops, switches, side-tracks, turn-tables, snow defenses and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the

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manner provided by the law." And also the following (sec. 112; Wilson's Rev. and Ann. St. 1903, sec. 1041): "If the owner of any real property over which said railroad corporation may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county or subdivision in which said real property may be situated as provided in this article, shall, upon the application or petition of either party, and after ten days' notice to the opposite party either by personal service or by leaving a copy thereof at his usual place of residence, or in case of his non-residence in the territory by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders of said county or subdivision (or if there be none such then of the territory) as commissioners, who shall be selected by said judge, and who must not be interested in a like question. The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land; and they shall forthwith make report thereof in writing to the clerk of the said court, setting forth the quantity, boundaries and value of the property taken, or amount of injury done to the property which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county or subdivision where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises: Provided, that if the corporation shall need or require for the purpose of

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constructing said railroad, to take and occupy any real property in any unorganized county, or in other unorganized country where there is no district court established, then the judge of the district court of the nearest organized county or subdivision (wherein such court is established) upon the line of said road, shall appoint commissioners to assess said damages; and he and they shall perform all other duties required of district judges and commissioners by the terms of this article, and either party shall have the right to appeal as in other cases herein provided: And provided further, that the report of the commissioners may be reviewed by the district court on written exceptions filed by either party in the clerk's office within sixty days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirming, modifying, or rejecting the same, or by ordering a new appraisement on good cause shown; or either party may within thirty days after the filing of such report file with the clerk a written demand for a trial by jury; in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered on the verdict in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, he shall not recover costs in the district court; and all costs in the district court may be taxed against him: And provided further, that either party may appeal from the decision of the district court to the supreme court and the money so deposited shall remain in the hands of the clerk, as aforesaid, until a final decision be had and subject thereto. But such review or appeal shall not delay the prosecution of the work on said railroad over the premises in question, if such corporation shall first have paid or deposited with the said clerk the amount so assessed by said commissioners; and in no case shall said corporation be liable for the costs on such review or appeal, unless the owner of such real property shall be adjudged entitled, upon either review or

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appeal, to a greater amount of damages than was awarded by said commissioners. The corporation shall in all cases pay the costs and expenses of the first assessment. And in case of review or appeal, the final decision may be transmitted by the clerk of the proper court, duly certified, to the proper register of deeds to be by him filed and recorded as hereinbefore provided for the recording of the report, and with like effect."

From these provisions it is clear that the railway company had the right to take such portion of the tract of land belonging to Bebout as was required for the construction and operation of its railroad, and that either the railway company or the land owner, if they failed to agree upon the amount of damages, had the right to give notice to the other party and apply to the judge of the district court for the appointment of commissioners to assess the damages. This right and power to initiate the proceedings by which the damages were to be ascertained is as completely conferred upon the land owner as upon the railway corporation. The corporation has the right to appropriate private property for its uses without the consent of the owner upon the condition only that it shall make just compensation therefor. If the Blackwell, Enid and Southwestern Railway Company went upon the land of Bebout and attempted to appropriate any portion of it for railway purposes, he had the right to require them to stop work until the damages could be ascertained and deposited with the clerk of the court. If he failed to require this to be done, and stood by until the work was completed, he gained no greater rights than he had before, and the railway company got no better rights by his silence. The failure to have the damages determined in advance did not change the rights or relations of the parties. The provisions of the statute were still adequate for the determination of the rights of both parties and for the enforcement of such rights when determined.

A corporation having the right of eminent domain may exercise that right wherever their necessities require it, and in exercis-

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ing such power the only requirement is that such corporation shall make just compensation for such private property as it takes or damages. Ordinarily, the power of eminent domain is exercised under statutory regulations, and where either party is given the right to initiate proceedings for the ascertainment of the damages and to invoke the process of the law specially provided for such cases, such statutory provisions have been held to be exclusive. It is said in 15 Cyc. 980 that: "Where a statutory remedy is given the owner of the property, such statutory remedy is usually held to be exclusive and to supersede the common-law remedies afforded the owner, particularly where condemnation proceedings are pending." And the text is abundantly supported by the authorities. *Kaukauna Water Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254; *Kuhl v. C. & N. W. Ry. Co.*, 77 N. W. 155 (Wis.); *Land v. W. & W. Ry. Co.*, 107 N. C. 72; *Shortle v. Ry. Co.*, 130 Ind. 505; *Ft. Wayne v. Hamilton*, 132 Ind. 487; *Rehman v. New Albany, etc., Ry. Co.* (Ind.) 35 N. E. 292; *Cairo, etc., Ry. Co. v. Turner* (Ark.) 25 Am. Rep. 564; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Dunlap v. Pully*, 28 Ia. 469; *Brickett v. Haverhill Co.*, 142 Mass. 394; *Brown v. Beaty* (Miss.) 69 Am. Dec. 389; *Fremont, etc., Ry. Co. v. Matheis*, 35 Neb. 48; *Little Miami R. Co. v. Witacre*, 8 Ohio St. 590; *Cherry v. Lane Co.* (Or.) 36 Pac. 531; *Phillips v. St. Clair Incline Co.*, 153 Pa. St. 230; *Milwaukee, etc. v. Strange*, 63 Wis. 178; *Aldrich v. Cheshire Ry. Co.* (N. H.) 53 Am. Dec. 212; *R. V. Ry. Co. v. Fink*, 18 Neb. 82, 24 N. W. 439.

And it seems to be the settled rule that the entry upon the property and the appropriation of the right of way and construction of a railroad, prior to the initiation of condemnation proceedings, will not defeat the right of either party to institute proceedings to condemn, whether the entry was with or without the consent of the land owner. 15 Cyc. 835; *Grand Rapids, etc., Ry. Co. v. Chesebro*, 74 Mich. 466; *Cory v. Chicago, etc., Ry. Co.*, 100 Mo. 282, 13 S. W. 346; *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac.

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757; *Jones v. New Orleans, etc., Ry. Co.*, 70 Ala. 227; *Newgass v. St. Louis, etc., Ry. Co.*, 54 Ark. 140, 15 S. W. 188; *San Francisco etc., Ry. Co. v. Taylor*, 86 Cal. 246, 24 Pac. -1027; *Florida Central Co. v. Bell*, 43 Fla. 359; *Chicago, etc., Ry. Co. v. Goodwin*, 111 Ill. 273; *Daniels v. Chicago, etc., R. Co.* 41 Iowa, 52; *Oregon Ry. v. Mosier*, 14 Or., 519, 13 Pac. 300; *Justice v. Nequehoning Valley Co.*, 87 Pa. St. 28; *Searle v. Lake Co. School Dist.*, 133 U. S. 553; *Albion Ry. Co. v. Hesser* (Cal.) 24 Pac. 288; *Railroad Co. v. Armstrong*, 46 Cal. 85; *Dunlap v. Ry. Co.*, 50 Mich. 470; *Secombe v. Milwaukee & St. P. Ry. Co.*, 23 Wall. (U. S.) 108; *Metropolitan Elev. Ry., In re.*, 12 N. Y. Supp. 506; *Mead v. Elev. Ry. Co.*, 24 N. Y. Supp. 908; *Jacksonville, etc., Ry. Co. v. Adams* (Fla.) 14 L. R. A. 533.

Upon the other hand, there are many cases asserting the doctrine that where there is nothing in the statute to indicate an intention on the part of the legislature that the remedy by condemnation should be exclusive, it is merely a cumulative remedy, and the land owner has his election as to which remedy he will avail himself of. 15 Cyc. 982; *Smith v. Chicago & W. Co.*, 67 Ill. 191; *Strickler v. Midland R. R. Co.*, 125 Ind. 418; *Chicago, etc., R. R. Co. v. Patterson*, 26 Ind. App. 295; *Atchinson, etc., Ry. Co. v. Weaver*, 10 Kan. 344; *Cohen v. St. L., Ft. Scott & Wichita R. R. Co.*, 34 Kan. 158, 8 Pac. 138; *Parsons Water Co. v. Knapp*, 33 Kan. 752, 7 Pac. 568; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Harrington v. St. Paul, etc., Ry. Co.*, 17 Minn. 215; *Hickman v. Kansas City*, 120 Mo. 110, 25 S. W. 225; *Ash v. Cummings*, 50 N. H. 591; *White v. N. W. N. C. R. R. Co.*, 113 N. C. 610; *Fries v. Wheeling, etc. R. R. Co.*, 56 Ohio St. 135; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73; *Parker v. East Tenn. Ry. Co.* 13 Lea. (Tenn.) 669; *Younkin v. Milwaukee Light, etc., Co.*, 112 Wis. 15.

While the former rule seems to be supported by the greater weight of authority, we think the rule giving to the land owner, when his land has been invaded and taken without his consent for

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railway purposes, the election to proceed under the statute for ascertaining damages in condemnation proceedings, or to maintain an independent suit for his damages, is more in consonance with our embryonic condition and more certainly insures the adjustment of all adverse rights and interests in such cases, and we adopt such rule as the law of this jurisdiction. However, under this rule, it is not permissible for a land owner to wage a suit for damages for the same injuries which may be adjudicated in condemnation proceedings when such condemnation proceedings are pending, or to commence such suit after the initiation of such proceedings. To proceed in the one case excludes the right to proceed in another. 15 Cyc. 983.

While both parties were dilatory in commencing proceedings to determine the damages in this case, it appears that Bebout filed his petition for damages prior to the commencement of the condemnation proceedings by the railway company, but he failed to procure service of summons until after the condemnation proceedings had been perfected. Hence, under the statute fixing the commencement of an action as of the date of the summons which is actually served, it follows that the suit of Bebout for damages was not commenced until after the condemnation proceedings were instituted and perfected by amendments.

The trial court erred in consolidating and trying the causes together. Everything that Bebout claimed could be determined in the condemnation proceedings, and, in any event, these proceedings were perfected and at issue before the action for damages was at issue, and when the condemnation cause went to trial the other case should have been dismissed. But the error in the proceedings only goes to a question of costs. Bebout was entitled to a jury trial in the condemnation case. He had not waived this right, and, as all the costs of the trial were made in the consolidated cases, no injury was done. The railway company, under the verdict of the jury, was liable for the costs of trial and final judgment in any event, and it is not to be presumed that any more

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or greater expense was incurred in trying the consolidated cases than would have been incurred in trying the condemnation case. Nor was any other controverted issue involved. The only question submitted to the jury was the difference in value of Bebout's land before and after the construction of the railway improvements.

The conclusions here reached make it apparent that the action for damages brought by Bebout was improperly brought, and must necessarily be at his cost. The condemnation proceedings were proper and involved all the rights of both parties growing out of the appropriation of the land and the right of way by the railway company, and by the terms of the statute (Wilson's Rev. and Ann. St. 1903, sec. 1041) the Blackwell, Enid and Southwestern Railway Company was liable for all the costs of the assessment of damages up to the time Bebout filed his demand for a jury trial, and, having by the verdict of the jury recovered a verdict more favorable than the award of the commissioners, he was entitled to recover all the costs in the condemnation proceedings. It appears from the record that the total costs accrued in both cases was \$276.40; of this sum \$89 accrued in the damage suit prior to the consolidation. In no event is it proper to charge any of said amount against the Blackwell, Enid and Southwestern Railway Company. .

The plaintiffs in error contend that the Blackwell, Enid and Southwestern Railway Company offered before trial to confess judgment in the condemnation proceedings for the sum of \$550, and that, inasmuch as Bebout only recovered \$480 by the verdict of the jury, he should not recover any costs which were incurred after the offer to allow judgment was made. The statute (Wilson's Rev. and Ann. St. 1903, sec. 4715) provides that: "The defendant in an action for the recovery of money only may, at any time before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. * * * If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall

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pay the defendant's costs from the time of the offer." If the proceedings brought by the railway company to condemn its right of way and to have the damages done to the landowner assessed by commissioners is "an action for the recovery of money," then the contention of the plaintiffs in error as to costs is well taken. We do not think it comes within the designation of the statute. The condemnation cause was instituted by the railway company for the purpose of authorizing it to take private property for its use without the consent of the owner. The question of damages and of compensation is an incident to the main cause. It is a special proceeding, initiated in a particular and special manner, different from that in bringing an ordinary action for the recovery of money. The commissioners are required to determine the quantity, boundaries, and value of the property taken or amount of injury done to the property of the owner, and on demand for jury trial the issues are tried *de novo*, and the question of the necessity for the taking and the quantity claimed are issues of fact that ordinarily may be inquired into in such proceedings. It must necessarily follow that such a proceeding is not one for the recovery of money only, and the offer of the plaintiff in error to confess judgment before trial for a greater sum than the amount awarded in the verdict of the jury cannot affect the question of taxation of costs.

The next complaint arises upon the action of the court in adding to the amount of the verdict of the jury the sum of \$109.20 as and for interest. There is nothing in the record to indicate that the jury did not in the assessment of damages include the total amount that they deemed the defendant in error entitled to, and, in the absence of any indication to the contrary, the presumption is that they included in their award of damages every element that the land owner was entitled to. This question was before this court in the case of *St. Louis, El Reno & Western Railway Company v. Oliver*, 17 Okla. 589, 87 Pac. 423, and, after reviewing the Kansas cases upon the subject, the rule was laid down that:

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"In a case tried by jury, where it is clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict, and it is unquestionably clear that the jury allowed no interest, or where the court reserved the question of allowance of interest until after verdict, and it is clearly ascertainable from the verdict or uncontroverted facts the dates from which and to which interest should be allowed, and the rate is fixed, the court may make the computation and add the interest so found to the sum found in the verdict, and render judgment for the aggregate amount." This rule goes as far as the law will warrant, and we think is unsafe to extend it. The case at bar does not come within this rule. The court did not reserve the question of interest from the jury. It was the duty of the jury to assess the entire damage, and we must presume that they did so. "In an action for the breach of an obligation not arising from contract * * * interest may be given in the discretion of the jury." Wilson's Rev. and Ann. St. 1903, sec. 2727.

In the state of the record, we must presume that the jury exercised its discretion. It was error for the court to add any additional sum to the verdict, and the amount so allowed must be deducted from the judgment. It was the duty of the court to render judgment upon the verdict. There was no error in the assessment of damages by the jury, and the judgment must follow the verdict.

We find no error necessitating the granting of a new trial. The trial court should have modified the judgment as to amount and as to costs.

The amounts all appearing approximately certain in the record, this court will set aside and vacate the judgment and make it conform to the judgment that the district court should have rendered. And said judgment for the sum of five hundred and eighty-nine dollars and twenty cents and for costs is set aside and vacated, and judgment is now here rendered upon the verdict of the jury. And it is now hereby ordered and adjudged that the

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defendant in error, J. J. Bebout, do have and recover of and from the Blackwell, Enid and Southwestern Railway Company the sum of four hundred and eighty dollars, with interest thereon at the rate of seven per cent. per annum from the 21st day of February, 1905, and the sum of one hundred and eighty-seven dollars and forty-one cents (\$187.41), costs accrued in said condemnation proceedings; and said cause No. 737, J. J. Bebout v. Blackwell, Enid and Southwestern Railway Company and St. Louis and San Francisco Railroad Company is dismissed at the costs of the plaintiff, J. J. Bebout. And said condemnation proceedings are in all things confirmed and made effectual.

The costs in the court are ordered taxed to the defendant in error.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

NETTOGRAPH MACHINE COMPANY v. A. J. BROWN AND E. C. TRUEBLOOD, *Administrator of the Estate of JENNIE BROWN, Deceased.*

(Filed September 4, 1907.)

(91 Pac. 849.)

1. **WRIT OR ERROR—Brief—Failure to File—Reversal.** Where the plaintiff in error has completed his record and filed it in this court and has served and filed a brief in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the alleged errors will be taken as confessed and the judgment may be reversed without an examination of the record.
2. **SAME—Rule 6 Invoked.** By rule 6 this court, where the defendant in error in a civil cause fails to file a brief in support of the judgment attacked by the appeal, the court is given the discretion to either affirm or reverse the cause, and may reverse the judgment without examining the record.

(Syllabus by the Court.)

Nettograph Machine Co. v. A. J. Brown and E. C. Trueblood.

Error from the Probate Court of Oklahoma County; before Ledru Guthrie, Special Judge.

Reversed and remanded.

Grant & McAdams, for plaintiff in error.

Opinion of the court by

BURFORD, C. J.: The Nettograph Machine Company, a corporation organized under the laws of the state of Missouri, brought its action in the probate court of Oklahoma county against the defendants, A. J. Brown and E. C. Trueblood, administrator of the estate of Jennie Brown, deceased, to recover judgment upon a promissory note in the sum of \$500 executed by the defendants on the 24th day of September, 1903, to the Oklahoma Trust & Banking Company, due in ninety days from date, with six per cent. interest from maturity, and \$50 attorneys fees, and by the payee assigned to the Nettograph Machine Company of St. Louis, the plaintiff in the action. The defendants set up by way of answer that the note was executed for 60 Nettograph machines and the right to use them in Oklahoma and Indian Territory, and alleged that the agent of the plaintiff made certain false and fraudulent representations by which the defendants were induced to execute the note, and they seek to either rescind and recover damages, or to recoup damages against the note if the sale is affirmed. It appears that the contract was in writing and is full and complete, but contains no warranty or representations as to the character of the machines or the work they can accomplish. On the trial the defendants were permitted, over the objection of the plaintiff, to introduce evidence tending to establish certain oral representations in the nature of warranties or of representations as to the qualities of the machines or the character of the work they were capable of performing, also of the earning capacity of the machines, which were operated by the "nickel-in-the-slot" device. The cause was tried to a jury, and verdict returned for the defendants. The plaintiff filed his motion for new trial, which was overruled, and

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judgment rendered in favor of defendants for the costs. The plaintiff brings the cause to this court by petition in error, and has filed a brief in which a number of specific errors are alleged and authorities cited in support of its position. The defendants have filed no brief and offered no excuse for their default.

The failure of the defendants in error to appear or file any brief must be taken as a confession of the alleged errors, at least sufficient to warrant a reversal of the judgment. *Enc. Pl. & Pr.* 729; *Parsons v. Haskell*, 30 Ill. App. 444; *Mattoon v. Holmes*, 14 Ill. App. 392; *Green v. Blalack*, 25 Tex. 417; *Richter v. Fresno Canal Co.* (Cal.) 36 Pac. 96; *Davis v. Hart*, (Cal.) 37 Pac. 486. This court has by rule required briefs to be filed in all civil causes, and has given the court the right to exercise its discretion as to the disposition to be made of the case when no brief is filed. The rule is as follows: "Rule VI. In each civil cause filed in this court, counsel for plaintiff in error shall serve his brief on counsel for defendant in error within forty days after filing his petition in error, and shall at the same time file fifteen copies of said brief with the clerk of the supreme court. And the defendant in error shall have thirty days after service on him of plaintiff in error's brief, in which to serve and file answer briefs. Proof of service of briefs must be filed with the clerk of this court within ten days after service. In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment." From a reading of plaintiff's brief and a casual inspection of the record, we feel so confident that there is fatal error in the record that we are satisfied no injustice is being done by a reversal.

The judgment of the probate court of Oklahoma county is reversed, and a new trial ordered, at the costs of defendants in error.

Irwin, J., absent; all the other Justices concurring.

A. B. Chapek and Frank Hakel v. Oak Creek Valley Bank.

A. B. CHAPEK AND FRANK HAKEL V. OAK CREEK VALLEY BANK,
a Corporation.

(Filed September 4, 1907.)

(91 Pac. 1129.)

1. **PARTNERSHIP—Rights and Liabilities as to Third Persons—Nature of Partner's Authority.** Under the provision of section 3879, Wilson's Rev. & Ann. Stat. 1903, a partnership obligation executed by one partner without the knowledge or consent of the other binds the firm and each general partner, if the obligation so executed is within the reasonable conduct of the partnership business.
2. **SAME—Renewal Note—Execution for Firm.** The execution and delivery of a promissory note as a renewal of a firm obligation already outstanding and due upon which liability is admitted, is a transaction within the scope of the business of the partnership.

(Syllabus by the Court.)

Error from the Probate Court of Garfield County; before M. C. Garber, Probate Judge.

Affirmed.

Denton & Denton, for plaintiffs in error.

McKeever & Walker, for defendant in error.

Opinion of the court by

GILLETTE, J.: This action was brought and tried in the probate court of Garfield county, to recover from A. B. Chapek and Frank Hakel, partners as Chapek & Hakel, upon a promissory note endorsed by said partnership and delivered to the plaintiff as a renewal of a former note of the same parties, which had been endorsed and transferred to the plaintiff. From the record it appears that Chapek & Hakel were partners engaged in the mercantile business in the state of Nebraska, and that in December, 1902, such firm was the owner and payee named in a note of \$425 executed by F. T. Stoner and W. B. Van Sandt & Co., which note

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was not paid at maturity. Upon the execution and delivery of said note, it was sold to the plaintiff bank, and, not being paid at maturity, was renewed by the makers by their executing a new note to Chapek & Hakel, who in turn endorsed the same to the bank and thereby took up the original note. Afterwards Mr. Chapek removed to Oklahoma, and, while he was in Oklahoma, said note again became due, and was again renewed. Mr. Hakel of the firm then in charge of their Nebraska business, without consulting his partner, Chapek, endorsed and negotiated this renewal in the same manner as had theretofore been done.

No question is raised with reference to the liability of Chapek & Hakel upon the note renewed and extended by the execution of the note in question, or that, by reason of the execution and delivery of the present note, the former note upon which they were admittedly liable was cancelled and delivered up. The sole question presented by this record being a question of the liability of Chapek & Hakel as endorsers and guarantors of the renewal note sued on, such endorsement having been made by Hakel without the knowledge and consent of his partner, Chapek. The amount of the judgment is not questioned, nor the fact of the execution and delivery of the instrument; the only question being the right of Hakel as a partner to so execute and deliver the same as a firm obligation. The statute of Oklahoma (sec. 3879 Wilson's Rev. & Ann. St. 1903) provides:

"Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-partners by an agreement in writing."

As the partnership is admitted, with Chapek & Hakel as general partners, the liability of the firm and each member thereof is governed by the above quoted statute, which provides that each partner has authority to do whatever is necessary to carry on the business, and for such purpose may bind his co-partners by an

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agreement in writing. The commercial world deals with a partnership in the light of its rights and liabilities as fixed and governed by the law, and under the law, as above stated, each partner has full power to act with reference to partnership affairs. No private agreement between the partners can affect third persons acting without knowledge of it, and, when Hakel endorsed the firm name to the instrument sued on in this case, the firm was thereafter liable by force of such endorsement if it was so done in the reasonable conduct of the firm's business.

Now, what were the facts? The record makes it clear that at the time Hakel endorsed the note in question with the firm name the firm was already indebted as endorsers upon another note which was then due and unpaid for the same indebtedness. By the endorsement and delivery of this note the former note was cancelled without other payment. The act was, therefore, the transaction of partnership business clearly within the provisions of the above statute, which governs in this case, in the absence of proof of a different law governing in the state of Nebraska. It would be clearly inequitable and unjust to hold that the partnership or that either of the partners might escape this liability after having, by the execution and delivery of it, cancelled an obligation upon which they were admittedly liable, and we think that no rule of law or any statute can be invoked to excuse them from such liability.

The plaintiff in error complains of the rule of the court in excluding the testimony of Chapek touching an agreement between him and Hakel to the effect that Hakel had no authority to sign the firm name. Such an agreement could in no wise bind third persons in dealing with the partnership business, where neither fraud nor collusion is alleged or attempted to be shown, and, as neither fraud nor collusion was shown or proposed to be shown, any private understanding between the partners was wholly immaterial.

Exceptions were taken upon the trial of the case by the plain-

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tiff in error to the instructions of the court. We have already seen that the plaintiff in error was liable upon the instrument sued on, and, in the absence of complaint as to the amount of the judgment, an erroneous instruction would not be sufficient to justify a reversal. We have examined the instructions, however, as well as those asked for by the plaintiff in error and refused, and are of the opinion that the rule of the court under the facts in the case was correct.

The judgment of the court below will be affirmed.

Garber, J., who tried the case while probate judge of Garfield county, not sitting; Irwin, J., absent; all the other Justices concurring.

C. W. GATES V. SETTLERS' MILLING, CANAL & RESERVOIR COMPANY, RICHARD MAPHET, JACOB WOLF, AND H. G. DRAKE.

(Filed September 4, 1907.)

(91 Pac. 856.)

1. **WATERS AND WATER COURSES—Irrigation—Prior Right—How Secured.** The right to the use of water from a public stream for irrigation purposes depends upon the construction of appropriate ditches, the conducting of water through such ditches to the place of intended application, and the application of such water to beneficial uses, all within a reasonable time; and he has the best right who is first in time.
2. **APPEAL—Review—Findings of Court—Sufficiency of Evidence.** Where the questions of priority of right to divert water from a running stream for the purposes of irrigation, and the question as to whether either of the claimants has used reasonable diligence in prosecuting his work and in making application to beneficial uses of the water, are controverted questions of fact dependent upon the weight of contradictory testimony and the credibility of witnesses, this court will not disturb the finding of the trial court, if there is competent evidence reasonably tending to support the finding and judgment.
3. **WATERS AND WATER COURSES—Priority of Water Rights—Distribution of Supply.** Where there are conflicting claims for priority in the use of water rights for irrigation purposes, the

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court, in an application for injunction, may make equitable distribution of the supply of water according to the priority of claimants and the quantity each has by his labor and diligence acquired the right to divert.

4. **APPEAL—Review—Conflicting Evidence.** Where a question depends upon the weight of the evidence for its determination, and the evidence is conflicting, or of a vague and uncertain character, the appellate court will not review such questions.

(Syllabus by the Court.)

Error from the District Court of Woodward County; before John L. Pancoast, Trial Judge.

Affirmed.

Stanley & Stanley, D. P. Marum, and Stanley, Vermillion & Evans, for plaintiff in error.

F. C. Price and Charles Swindall, for defendants in error.

Opinion of the court by

BURFORD, C. J.: This action involves the question of priority of right to divert water from the Cimarron river for irrigation purposes. Oklahoma has not so far been credited to the arid belt, and agriculture has been successfully conducted by the aid of nature's supply of moisture; but in some localities, in the higher altitudes pertaining to the extreme western counties of the territory, irrigation upon a small scale has been profitably resorted to, and an increasing public interest is being developed in not only the expediency, but the necessity, for extensive irrigation of agricultural and meadow lands in the fertile valleys of western Oklahoma. In the year 1897 our legislature passed an irrigation act. (1 Wilson's Rev. & Ann. St. 1903, p. 814, c. 44, §§ 3282-3304). This statute was repealed in 1905, and a more comprehensive law substituted, which is still in force. (Laws 1905, p. 274, c. 21, art. 1.) It is conceded that neither of the parties to this litigation proceeded under either of these statutes; but both, as we understand the case, base their claims upon the general rule of law applicable to such cases. Yet, if any rights were acquired and be-

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came vested under the statute of 1897, the statutory provisions must control as to such rights.

It appears from the record that the plaintiff in error, Gates, commenced his suit in the district court of Woodward county against the Settlers' Milling, Canal & Reservoir Company, on November 6, 1903, to enjoin the defendants from diverting water from the Cimarron river, on the ground that such diversion was a material interference with a prior right acquired by him to the use of the water for irrigation purposes. Gates bases his claim of priority upon an appropriation made by J. H. Williamson, through a ditch constructed in the early part of the year 1901, which was about three miles in length and took the water from the river about two miles below the point where the defendant's ditch connected with the river. Williamson sold his land and ditch and his water rights to Gates in July, 1902. A portion of the flow of water in the Cimarron river was actually appropriated to beneficial uses for agricultural purposes during the years 1901 and 1902. The irrigating ditch used by the defendants, which is made the subject-matter of this controversy, was commenced about the year 1902, and has its headgate above the point where the plaintiff procures his water supply. But it is contended that this ditch is but a continuation and change of work begun in 1896 and continuously carried on until the time of the bringing of this suit. The Settlers' Milling, Canal & Reservoir Company was incorporated under the laws of the territory of Oklahoma on June 4, 1895, for the purpose, as shown by its articles of incorporation, of "constructing a ditch to convey water to lands to be used for milling purposes, or for the purpose of irrigation of farming lands." The stockholders and officers of this company were farmers and land owners whose lands were to be benefited by the irrigation project, and the capital stock paid in consisted almost entirely of the work done by the individual stockholders in constructing the ditch, dam, flumes, and other necessary work in repairing the same. The year the company was incorporated it

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did some work in repairing and strengthening a dam in the Cimarron river which had been partially constructed and used by Mr. Maphet, one of the stockholders and the president of the company. About 150 loads of stone were hauled and dumped into the river-bed to strengthen the old dam. The purpose of the company was to divert the water from this point and make use of the old Maphet ditch, which it seems the corporation succeeded to by common consent. In the spring of 1896 100 loads more of stone were put in to support the old dam. Later on in the year a break occurred in the dam, and piling was driven in and supported by more stone put in for that purpose. The dam was completed across the river, 225 feet in length. Owing to frequent rises in the river that year, heavy timbers and sod were used to strengthen and repair the work, which was completed at an estimated cost of \$2,000. This improvement was a distance of twelve miles from a railway station, in a sparsely settled country, and forty miles from where some of the timbers and piling had to be obtained and hauled. The company also caused a survey to be made from the old Maphet headgate, along the old Maphet ditch, in an easterly course a short distance, and thence continuing east to Horse creek, where it was necessary to construct a flume to carry the water across this creek. The old ditch was cleaned out, and a new portion constructed and completed, a distance of one mile, from the old headgate to Horse creek. In the spring of 1897 work was begun upon the flume, which was constructed by driving three rows of cedar piling into the ground from 8 to 11 feet, upon which was built of lumber an aqueduct 100 feet long and 16 inches deep to carry the water over the creek. The ditch was extended another half mile beyond this flume, and a full head of water turned in and conducted through the flume and into the laterals, carrying the water to the farms of T. C. Maphet and G. C. Maphet, and by them applied to about 40 acres of land and crops. The company also in 1897 applied to the secretary of the interior for reservoir and right of way privileges over the public lands, which

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application was granted and confirmed. It also gave notice, under the provisions of the statute of 1897, of its intention to appropriate water, which notice was recorded in the office of the register of deeds for Beaver county.

During the year 1898 water was flowing through this ditch and flume until April or May, when a flood in Horse creek swept the flume away and carried it down the river. Instead of rebuilding the flume, the ditch was extended up the west side of Horse creek one-fourth of a mile to a point where the ditch and bed of the creek were on the same grade, and the water was conducted across the bed of the stream, by throwing up a sand barrier, and back down the east side of the stream, through a new ditch, until it again connected with the old ditch, and was applied during the season to crops east of Horse creek, consisting of sixty acres of kaffir and forty acres of wheat. The ditch and levees across Horse creek were washed out and repaired a number of times during the season of 1898. In 1899 the levee across Horse creek was rebuilt, and the water was applied to 70 acres of land, some of which was meadow. A rise in the river wrecked one end of the dam, and it was repaired by putting in rock and piling. In 1900 the ditch was completed to Red Bluff, making 3 1-3 miles of ditch built by the defendant company, and 130 acres prepared for crop, which it was the purpose to irrigate, and water was applied to 100 acres. On April 8, 1900, an unprecedented rise in the river caused it to cut a new channel, running straight across and cutting off the Horseshoe bend, and leaving the diversion improvements of the Settlers' company a mile south of the new channel, and completely cutting off its water supply. An attempt was made by the company to turn the river back into its old channel by damming the cutoff, and about 400 loads of stone, sand, brush, and other obstructions were placed in the channels, without beneficial results. It was then found necessary to go farther up the river, and divert the water at a new point, and construct a new ditch to a connection with the old ditch at the old

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headgate. and this was done and the water turned into it. It was then discovered that the channel of the river had cut below the bed of the ditch, and the water would not rise high enough to flow through the old ditch. The next year, 1901, the extension ditch was deepened and the water carried to the old headgate, across Horse creek by the sand levee, and applied to a small area of land. This raised the sheet water so as to produce subirrigation for 130 acres of crops and 70 acres of grass land. The river channel at the cutoff continued to deepen, and the sand dam washed out, and the ditch filled with sand for several rods before the next season, and after repeated efforts to overcome the difficulties, it was determined to abandon this scheme and adopt a new point of diversion and scheme of distribution. In the spring of 1902 the company selected a new point of diversion, where Horse creek empties into the Cimarron, and constructed a ditch from this point to a connection with the old ditch between there and Red Bluff, and paralleled it into the valley designed to be irrigated. This new route reached practically the same territory to be irrigated, ran in the old channel a portion of the way, and followed the old right of way for some distance. The work made good progress, and at the time of the trial about 8 miles of ditch and laterals were completed, and several hundred acres of land were receiving water. This last improvement is the one attacked by plaintiff's petition. At the time this new route was adopted and the new work done the plaintiff had appropriated a portion of the flow of the river for his uses, and the priorities of the contesting claimants is the sole question for determination. The cause was tried to the court without the intervention of a jury, and a decree entered making an equitable distribution of the water according to the amount that each had actually appropriated for beneficial uses, as shown by the evidence and as found by the court, at the time the suit was instituted. The court made a general finding upon which the decree was based.

It is contended that the court found certain facts specially,

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and we are asked to apply the law to these findings. A close inspection of the record fails to disclose that any request was ever made by either party for a special finding of fact, and in the absence of such request the finding of the court, however full and complete, amounts to no more than a general finding. 8 Enc. Pl. & Pr. 933-935; *Conner et al. v. Town of Marion*, 112 Ind. 517, 14 N. E. 488; *Caress v. Foster*, 62 Ind. 145; *Bake v. Smiley*, 84 Ind. 212. Nor will the incorporation of the oral opinion of the court into the case-made give it any special significance; and this court will only look to the record as embraced in the entry upon the journal. This question was specifically decided in *Guss v. Nelson*, 14 Okla. 296, 78 Pac. 172.

The ditch of the plaintiff was begun in January, 1901, and carried on to completion in May, 1901, when the water was conducted through the ditches and water actually applied to the irrigation of cultivated lands. It seems the settled law in the states where irrigation problems have been dealt with that, in order to acquire a vested right in the use of water for such purposes from the public streams, three things must concur: There must be the construction of ditches or channels for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place to be used; and it must be actually applied to beneficial uses, and he has the best right who is first in time. The plaintiff in error contends, first, that the defendants' present place of diversion and location of its ditch is not a continuation of the former works, and that its right of appropriation must be confined to the time of the construction of its last diversion works and appropriation; and, secondly, that, if the last work done is a continuation of the former efforts, the work was not carried on with such diligence as to warrant its claim of priority. There seems to be no serious difficulty in determining the law on these questions; but the difficulty, if any, lies in the application of the law to the facts. The law requires that there must be reasonable diligence by one intending to appropriate water from

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a stream, both in the prosecution of the improvements necessary to conduct the water to the place of use and in the application of the water to beneficial uses. *Moss v. Rose* (Or.) 41 Pac. 666; *Arnold v. Passavant* (Mont.) 49 Pac. 400; *Conaut v. Jones* (Idaho) 32 Pac. 250; *Senior v. Anderson* (Cal.) 47 Pac. 454; *Elliott v. Whitmore* (Utah) 65 Pac. 73; *Hall v. Blackman* (Idaho) 68 Pac. 21; Gould on Waters, sec. 226 to 239; Long on Irrigation, sec. 47; *Ft. Morgan Land Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 Pac. 1032; *Becker v. Marble Creek Co.* (Utah) 49 Pac. 893; Kinney on Irrigation, sec. 164; *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 75. And a failure to use due diligence will be treated as an abandonment as against a subsequent appropriator whose right has attached pending the completion of the first appropriator's right.

But both questions of fact contended for by plaintiff in error were determined against him by the trial court. There was a large number of witnesses examined, and some of the testimony is of a vague and uncertain character, while some is contradictory; but there is competent evidence reasonably tending to support the finding and judgment of the court. Practically all the evidence introduced was upon the question of the work done each year by the defendant Settlers' company and its predecessors in their efforts to successfully conduct the water from the Cimarron river through the various channels and flumes constructed across Horse creek, and the number of acres of agricultural land it was applied to each year, covering a period of seven or eight year. It appeared from the testimony of these witnesses that the Cimarron river was a sandy, treacherous stream, in which it was difficult to construct a dam or barrier which would serve to turn the water into the irrigation ditches; that in the spring of each year the rises in the river would fill the ditches with sand and destroy the dams, flumes, and other improvements; that the timber, lumber, and materials for piling, dams, and flumes had to be transported with teams long distances; and that the work had to be done by farmers

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and settlers, who could only give part of their time to this work. It was also shown that the river changed its channel and left the diversion works a mile or more from the new channel, effectually cutting off the supply of water and making it necessary to survey and construct another connection with the river at a new point of diversion; and each year the company or its members were making repairs on the old, or constructing new, works to enable them to utilize the water supply. Reasonable diligence was required of them. As to what constitutes reasonable diligence must be governed by the circumstances of each particular case, and necessarily varies with each particular case. It is a question of fact, and must be determined from all the evidence in the case. The trial court heard this evidence and found, for the defendant company, that it was the prior appropriator of the water to the amount and extent it had actually applied to beneficial uses at the time the plaintiff made his appropriation, and gave to the plaintiff the right, after this quantity was taken by the defendant, to take an amount equal to the quantity beneficially applied by it, after which the defendant's right would again attach to any excess. We cannot disturb this action of the trial court. It has become the settled rule of this court that the finding of a court upon the facts will be treated the same as the verdict of a jury, and, where there is competent evidence reasonably tending to support the verdict or finding, this court will not weigh the evidence or attempt to determine the preponderance, but will affirm the action of the trial court.

There are other questions argued in the briefs, but each of them depends upon the weight of the evidence, and we cannot review them.

The judgment of the district court of Woodward county is affirmed, at the costs of the plaintiff in error.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Chas. R. Bostick v. Board of County Commissioners of Noble Co.

CHARLES R. BOSTICK, *County Attorney of Noble County*, v. BOARD
OF COUNTY COMMISSIONERS OF NOBLE COUNTY.

(Filed September 4, 1907.)

(91 Pac. 1135.)

1. **TAXATION—Certificates of Error—County Commissioners May Issue, When.** By section 1, article 1, chapter 31, of the Session Laws of 1905, boards of county commissioners of the various counties of Oklahoma are authorized to issue certificates of error to taxpayers upon a proper showing in three classes of cases: First, where the same property has been assessed more than once for taxes of the same year; second, where the property has been assessed in the county for the year to which the same was not subject; third, where the property has been destroyed by flood or tornado to the extent of at least fifty per cent. of its cash value. In no other case or class of cases is there any provision for issuing certificates of error for taxes on property erroneously assessed.
2. **SAME—Acts of City Board of Equalization.** Where an assessment of property is made, and the board of equalization of the city within which such property is located raises the valuation of such property for the purpose of taxation, the board of county commissioners have no authority under the law to issue to the owner of such property a certificate of error upon the theory or because of the fact that the action of the board of equalization was unwarranted and without authority of law.
3. **SAME—Review by District Court—Restricted Jurisdiction.** Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only, which is the jurisdiction that the inferior tribunal had and none other; and in such case the district court cannot convert such action into an action of equity and assume a jurisdiction of equity that the inferior tribunal did not have.

(Syllabus by the Court.)

*Error from the District Court of Noble County; before Bayard
T. Hainer, Trial Judge.*

Reversed.

Charles R. Bostick, for plaintiff in error.

S. H. Harris and L. L. Cowley, for defendant in error.

Opinion of the Court.

Opinion of the court by

PANCOAST, J.: On the 3rd day of January, 1906, the Perry Mill Company filed a petition before the board of county commissioners of Noble county asking for a certificate of error in the amount of \$1,594.62, on the ground that the tax levy for the year 1905 was erroneous and excessive, by reason of a mistake made by the board of equalization of the city of Perry. The petition is as follows:

“Application of the Perry Mill Company for Certificate of Error.

“Comes now the Perry Milling Company, by D. R. McKinstry, and complains to the honorable board of county commissioners that the taxes assessed against him for the year 1905 are erroneous and excessive; that the original assessment made by the assessor was raised beyond all reason by the city board of equalization, without authority of law and by the reason of a mistake made by the city board, as evidenced by Exhibit A, hereto attached and made a part hereof. Your complainant therefore prays that a certificate of error in the sum of \$1,594.62 be issued to said Perry Milling Company by said board of county commissioners:

Amount charged on tax rolls:

Real estate, value \$16,718.00, taxes	\$1,504.62
Personal, value \$11,000.00, taxes	990.00
Amount as per schedule and exhibit A	\$2,494.62
Real estate and personal, \$10,000.00	900.00
Taxes erroneously charged	\$1,594.62

“[Signed] PERRY MILLING COMPANY.

“FER D. MCKINSTRY.

“Subscribed and sworn to before me this 2nd day of January, 1906.

[SEAL]

“C. L. RITTER, Notary Public.

“My Commission expires May 25, 1909.

“H. L. Boyes, being duly sworn, deposes and says that he has read the foregoing petition and upon his oath states that the matters and things therein alleged are true as he verily believes.

“[Signed] H. L. BOYES.

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"Subscribed and sworn to before me this 2nd day of January, 1906.

"JAS. M. TAYLOR, Notary Public.

"My commission expires Sept. 26, 1909.

"Filed Jan. 3d. 1906, JOSEPH E. DOLEZAL, County Clerk.

"Exhibit A.

"Perry, Okla., Dec. 7, 1905.

"To the Honorable Board of County Commissioners—

"Gentlemen: Upon reflection, and reviewing the matter, we feel that the assessment made against the Perry Mill Company last spring was a mistake, and by making comparison with other institutions of this city, we feel that an assessment on real estate and personal property for \$10,000.00 is fair and just, and ask that you please give this matter your consideration and make the correction above stated.

"Very respectfully,

"C. S. MINOR, Assessor.

"F. M. BUSCH, Clerk.

"A. E. SMYSER, Mayor.

"To Whom It May Concern:

"This is to certify that to the best of my knowledge and belief our elevator, situated in the city of Perry, Oklahoma, did not contain to exceed ten thousand bushels of wheat on the first of March, 1905.

"[Signed] D. MCKINSTRY.

"Subscribed and sworn to before me, a notary public, this 7th day of December, 1905.

[SEAL]

"C. L. RITTER, Notary Public.

"My commission expires May 25th, 1909."

Said petition was acted upon by the board of county commissioners and a certificate of error was issued as prayed for. On the 20th day of January, 1906, a petition was presented to Charles R. Bostick, county attorney of Noble county, by more than seven resident taxpayers of Noble county, asking that he, as county attorney, appeal to the district court from the aforesaid decision of said board of county commissioners, and on the 22nd day of January, 1906, said county attorney filed his notice of appeal with the county clerk and duly perfected the same. On the 24th day

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of February, 1906, said cause was heard by the district court upon the merits. Some evidence was introduced by the respective parties, the plaintiff contending that the board of equalization had increased the valuation as returned by the assessor, and that such assessment was excessive as returned by the board of equalization; further, that no evidence had been heard by the board of equalization, but that the increase of valuation had been made upon information coming from other sources. No evidence was offered on behalf of the Perry Mill Company tending to show that the same property had been assessed more than once, or had been assessed in the county for the taxes of a year to which the same was not subject, or that the property had been damaged by flood or tornado. At the close of the evidence of the plaintiff the county attorney demurred to the same, which demurrer was overruled. The county attorney then attempted to show that the same proposition had been before the board of county commissioners prior to the time of this action, and the relief prayed for had been refused. This evidence was excluded by the court, and the court rendered judgment approving and affirming the action of the board of county commissioners. The appeal was taken from this order. Motion for new trial was filed and overruled.

It is contended by the plaintiff in error that under the statutes of Oklahoma a board of county commissioners has no jurisdiction or power to correct an alleged erroneous assessment upon any other ground than because the same "has been assessed more than once for the taxes of the same year or has been assessed in the county for the taxes of a year to which the same was not subject, or where the property of the complainant has been destroyed by flood or tornado; second, the jurisdiction of the district court when proceeding upon an appeal from an inferior tribunal does not extend beyond the jurisdiction of that tribunal from which the appeal arose." The statute referred to by the plaintiff in error is section 5972, Wilson's Rev. & Ann. St. 1903, which is as follows:

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"The boards of county commissioners of the various counties of the territory of Oklahoma are hereby empowered to correct, either upon the assessment rolls or upon the tax rolls of the county, any double or erroneous assessment of property for taxation for any particular year, in the manner provided in the next section, and not otherwise: Provided, that this act shall in no wise be construed as a grant of power to boards of county commissioners to equalize valuations of property for taxation, as between individuals."

Section 1 of article 1, chapter 31, Session Laws of 1905, amending section 5973 of Wilson's Rev. & Ann. St. 1903, provides as follows:

"That section 5973 of Wilson's Revised and Annotated Statutes of Oklahoma be, and the same is hereby amended to read as follows: 'Section 61. Whenever, at either of the regular meetings of the said boards in January, April, July and October, upon complaint of the person or persons beneficially interested, their agent or attorney, it shall be made to appear, by the testimony of the claimant and at least one reputable witness, borne out by the records of the county, that the same property, whether real or personal, has been assessed more than once for the taxes of the same year, or the property, whether real or personal, has been assessed in the county for the taxes of a year to which the same was not subject; or where the property of the complainant, whether real or personal, has been destroyed by flood, or tornado to the extent of at least fifty per cent. of its cash value, which said damage or decrease in value shall be established by the testimony of at least five reputable witnesses who shall be freholders and residents of the county in which complainant resides, the said board is hereby empowered to issue to complainant a certificate of error, showing that the complaint has been investigated by the said board; that the said board has been satisfied of the truth of the allegations of the said complaint, and direct the same to the county treasurer of their said county directing the said county treasurer to accept the said certificate as a payment of cash to the amount found by the said board to have been unjustly assessed, or entitled to be refunded, which said amount shall be named in the said certificate, and shall by the treasurer be credited on his tax roll against the tax so found to be erroneous or to be refunded:

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and the treasurer shall retain the said certificate, and shall be credited with the same, as cash, in his settlement as such treasurer."

These sections are the only provisions of the statutes of Oklahoma granting the power to a board of county commissioners to correct any kind of an individual tax levy and issue certificate of error therefor. The first empowers the board to correct an erroneous assessment, and the second provides the character of erroneous assessment that may be corrected, and the manner in which the same shall be corrected, and for the issuing of the certificate of error. The character of assessments that may be corrected are: First, a double assessment; second, when the property has been assessed more than once for the taxes of the same year; third, when the property has been assessed for the taxes of a year to which the same is not subject to assessment; and, fourth, when the property has been damaged by flood or tornado to the amount of fifty per cent. of its value.

It is contended by the defendant in error that the substance of the petition was to suggest to the board of commissioners that a legal assessment on the property of the Perry Mill Company had been made and returned, and that the subsequent act of the board of equalization was entirely without authority of law and not done under any pretense of comparing valuation or adjusting assessments between taxpayers, that, therefore, the board of county commissioners had a right to adjust the matter. It will be noticed by an examination of the record that in the original assessment the valuation of the real estate was \$6,825; that the valuation of the personal property was \$3,000, making a total of \$9,825. By the action of the board of equalization lot ten was raised from \$2,000 to \$5,000, lot eleven from \$2,000 to \$5,000, lot twelve from \$1,500 to \$3,000, and lot thirteen from \$1,000 to \$2,000, and the personal assessment was raised from \$3,000 to \$10,000, making a total raise of \$15,500. By the petition it was conceded that, notwithstanding the original assess-

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ment was \$9,825, yet a fair valuation would be \$10,000, and that the commissioners' action was upon a basis of \$10,000, so that it cannot be contended that this action before the board of county commissioners was intended to correct the action of the board of equalization by placing the assessment where it originally stood; that is, by entirely eliminating the action of the board of equalization, so as to leave the assessment where it originally stood. This in effect conceded the authority of the board of equalization to take action in the direction in which it had proceeded, but was in effect to claim that the act of equalization had been erroneous and excessive, and this was in effect asking the board to equalize the valuation of the property for taxation as between individuals, which is specifically prohibited by the first section quoted. There was nothing whatever before the board of county commissioners that would authorize that body to issue a certificate of error upon any ground named in the statute, and there was no pretense of doing so. These sections of the statute above quoted are the only sections pertaining to the power of the board to issue a certificate of error or correct assessments of any character for which certificates of error can be issued.

It is claimed, however, that the action of the board of equalization was void, and, being void, that the board of county commissioners and also the district court, on appeal, could correct the same and do equity between the parties. We can not agree with this contention. The board of county commissioners has only such authority as is prescribed by the statute, and, no matter what relief a court of equity could give in a case of the character under consideration, the board of county commissioners is not clothed with that equitable power, and we can not conceive upon what principle or upon what authority a board of county commissioners would assume to issue a certificate of error in a case of this character, which is in effect discharging the complainant's property from taxation to the amount named in the certificate. Boards of county commissioners in this territory are given no such jurisdiction, and

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we think that the withholding of such authority from boards of county commisisoners is a wise one. It is well settled that, upon appeal from an inferior tribunal, the appellate court takes only such jurisdiction as the inferior tribunal had, and can only investigate in a given case those propositions which were before the inferior court, and which the inferior court might have investigated and determined. 2 Cyc. 537; *Cooper v. Armstrong*, 3 Kan. 78. Therefore, the board of county commissioners having no power to take the action which they assumed, and the jurisdiction of the appellate court being the same as that of the inferior tribunal, the judgment of the board of county commissioners should have been reversed..

This action, upon appeal to the district court, should not have been so construed as to give the district court the same power and authority which the court would have had in a direct proceeding brought for the purpose of questioning the right or authority of the board of equalization to raise the valuation of the property or to prohibit the correction of the tax which is claimed to have been void by reason of the erroneous action of the board of equalization. There has from time to time been a vast amount of just criticism growing out of the unequal valuation of property. and it would seem that there must have been some reason for the board of equalization to take action in this matter. Whether or not they acted legally and in pursuance of law it is not necessary for us here to determine. If they did, their acts were valid. If they did not, there was a remedy by action in a court of equity, and the parties aggrieved should seek a remedy in the proper forum, as there, and there only, could the matter properly be investigated. There, and there only, could the full facts be shown. But, be that as it may, the question here presented is only as to the power of the board of county commissioners to make a correction and issue a certificate of error upon the case made to them, and the power of the court upon appeal to assume at this time jurisdiction which the board of county commissioners could not assume.

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We are of the opinion, therefore, that the trial court erred in rendering judgment sustaining the board of county commissioners in their action, and for that reason the case is reversed, with directions that the district court vacate its judgment and enter an order reversing the judgment of the board of county commissioners.

Hainer, J., who presided in the court below, not sitting; Irwin J., absent; all the other Justices concurring.

DEMING INVESTMENT COMPANY, *a Corporation*, v. FRANK MEYER
AND JAMES SACKETT, *Late Partners Doing Business Under
the Firm Name and Style of MEYER & SACKETT.*

(Filed September 4, 1907.)

(91 Pac. 846.)

BROKERS—Real Estate Agent—Fraud—Concealment of Commission from Principal. Where a real estate agent, having authority to make a sale of his principal's land, reports to another agent of the principal that he can sell the land so as to net the principal a certain sum, and that he is making the sale for a greater sum, thereby disclosing that the amount which will be paid to the principal is not the full purchase price, but that the excess will be retained by the agent as his commission, and no contract is shown between the principal and agent that he shall receive any specified amount for his services, although the amount of the excess is not disclosed, the agent commits no fraud or deception by not disclosing the amount of such excess.

(Syllabus by the Court.)

*Error from the District Court of Canadian County; before C. F.
Irwin, Trial Judge.*

Affirmed.

Snyder & Clark, for plaintiff in error

STATEMENT OF FACTS.

This is an action brought by the plaintiff in error against the defendants in error, in the district court of Canadian county, to recover the sum of \$97.50. The record discloses that the plaintiff was a corporation doing business at Oswego, Kansas, and had a

Statement of Facts.

branch office at Oklahoma City in charge of salaried employes whose names were, at the time of the transaction in question, R. P. Carpenter, manager, and H. W. Rule, the office man. The plaintiff had a tract of land in Canadian county at the time which they placed on the market for sale. The defendants were real estate agents. The employes at Oklahoma City had no general authority to make sales, and what authority was given them was specifically delegated in each particular instance. At a time prior to the transaction in question, but at what time is not disclosed by the record, the defendants had authority to sell the tract of land for the sum of \$700. The conditions under which they had the authority are not disclosed by the record, nor is there anything disclosed as to what their commission would be if such sale was made. About August 1, 1900, one of the defendants communicated to the plaintiff's employe, Rule, at Oklahoma City, over the telephone, that he could sell the land in question so as to net the plaintiff in error \$900. This, it seems, was a larger sum by \$100 than the defendants had recently been authorized to sell the place for. In the conversation between the defendant Meyer and Rule over the telephone, Rule suggested that he would rather report the deal to the plaintiff in a different form, and suggested that the sale be reported at \$950 with commission at 5 per cent. To this suggestion Meyer stated, in substance, that he did not care how Rule reported the sale but that his proposition was \$900 net to the company. He was then asked by Rule if he was getting any more, and he stated that he was; that he (Rule) could notify Mr. Deming any way he pleased, either as a commission sale or not, but that the proposition that he made was that he was to sell the place so as to net the company \$900. Rule's idea seems to have been that Mr. Deming would be better satisfied with a sale reported at a certain commission, and that it would be more readily accepted in that form. There is nothing contained in the record from which it can be determined that there was any contract for any specified commission, or that the defendants were to receive in case of sale

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any specified amount for their services. This sale was reported to the plaintiffs by Rule at \$950, with five per cent. commission, \$47.50. The deed was forwarded, payment made to the defendants, and settlement made by them upon the basis of \$900 net to the company. Subsequently the plaintiff learned that the land had been sold for \$1,100, and this action is brought to recover the excess between \$950 and \$1,100, as well as the commission of \$47.50 paid.

Opinion of the court by

PANCOAST, J.: The theory upon which this action was brought was that there was fraud practiced upon the plaintiff by the defendants; and that, as agents of the plaintiff, the defendants were bound to disclose to the plaintiff all the facts and circumstances within their knowledge in any way calculated to enable the plaintiff to judge of the value of the property, as well as the propriety of accepting the offer made for it; and that, in failing to make such disclosure, the defendants had deceived the plaintiff, and because of such deception were not even entitled to any commission for the sale. A considerable number of authorities are cited in support of the position taken by the plaintiff in error to the effect that an agent who is authorized by his principal to sell the property of the latter upon specified prices and terms is in duty bound, upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before the sale, as expressly authorized, and his failure to do so amounts to a fraud in law. The trial court found against the plaintiff in error upon the facts disclosed in the case. In fact, there is no contradictory evidence contained in the record. The finding must have been based entirely upon the defendant Meyer's evidence, and, if there is any fraud or deception disclosed in the record, it is shown by his evidence alone.

There is no question as to the correctness of the law cited by

Opinion of the Court.

the plaintiff, but is the rule contended for applicable to the facts disclosed in this case? These defendants were simply real estate agents. They reported the facts as far as the facts are disclosed at all, to the branch office of the plaintiff. In this report they disclosed the fact that the purchaser was paying more than \$900 for the land, and that the excess was what they expected to receive for their labor. If this land had been put into the hands of these agents to sell at a specified price, and they had contracted to sell the same at that price and take for their services a specified sum of commission, then they would have been duty bound to have reported to their principal any excess which they might have received, and take for their services the commission agreed upon. But the record does not disclose such a state of facts, and although it does disclose that they had, prior to the sale, been authorized to sell the land for a smaller sum than they did sell it at, and at a still smaller sum than the plaintiff received from the sale, yet there is nothing to indicate what their commission was to be or that it was to be any specified sum. The report in the telephone conversation between Meyer and Rule was sufficient to show that the defendants were receiving some greater sum than \$900 for the land, and the plaintiff therefore had notice of the nature of the transaction. The only deception, if any at all, was practiced by Rule in reporting to the home office, but the defendants were in no wise responsible, as they left the manner of Rule's reporting the sale to his own judgment, specifically giving him to understand that he would report it as he pleased, but that they were to make the sale so as to net the company \$900. The evidence as disclosed by the record is very distinct upon this proposition. We must therefore conclude that the rule of law sought to be invoked by the plaintiff in error in this case is not applicable here, because of the fact that some of the essential elements are lacking, and that there was no fraud or deception practiced on the part of the defendants in error. We see no reason why a person may not report a sale of a piece of land to his princi-

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pal for a certain sum when it is understood that the property is being sold for a greater amount and that the excess will be retained as a commission for the services performed.

There being no error in the record, the judgment of the court below is affirmed.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

JOHN F. MCCLELLAN V. OTIS A. MINOR.

(Filed September 4, 1907.)

(81 Pac. 863.)

1. **WRIT OF ERROR—Review of Evidence—Necessary Recital.** Where the case-made does not contain an averment by way of recital to the effect that it contains all the evidence introduced on the trial of the cause, this court will not review any question which requires an examination of the evidence in order to arrive at its correct determination.
2. **SAME—Case-Made—Verification.** The certificate of the judge to a case-made verifies and makes conclusive, as to their truthfulness, all recitals and averments made in the case, but this rule does not apply to certificates of counsel or to other matters incorporated into the case.

(Syllabus by the Court.)

Error from the District Court of Kay County; before Bayard T. Hainer, Trial Judge.

Affirmed.

D. S. Rose, for plaintiff in error.

Hackney & Lafferty, for defendant in error.

Opinion of the court by

BURFORD, C. J.: This was an action by Minor against McClellan to enforce specific performance of a contract to convey real estate. Issues were made and the cause tried to the court. Upon the evidence introduced the court found the issues in favor of the plaintiff and decreed specific performance of the contract.

Opinion of the Court.

The defendant below brings the cause here on petition in error and prays a reversal of the judgment.

None of the questions presented and argued by counsel for plaintiff in error can be determined without a review of the evidence introduced on the trial of the cause. The case-made attached to the petition in error contains what purports to be the evidence; but this court has established the rule that unless the case-made contains the recital or its equivalent, that the case contains all the evidence introduced on the trial of the cause, this court will decline to consider any question dependent upon an examination of the evidence for its determination. *Frame v. Ryel*, 14 Okla. 536, 79 Pac. 97; *Board of Washita County v. Hubble*, 8 Okla. 169, 56 Pac. 1058; *Sawyer Lumber Co. v. Champlin Lumber Co.*, 16 Okla. 90, 84 Pac. 1093; *B. K. & S. W. Ry. Co. v. Grimes*, 38 Kan. 241, 16 Pac. 472; *Ryan v. Madden*, 46 Kan. 376, 26 Pac. 680; *Pelton v. Bauer* (Colo.) 35 Pac. 918; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324.

The case in question contains a statement signed by counsel, as follows: "The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, judgments, decrees, and proceedings upon which judgment was rendered."

This is not equivalent to a statement that the case contains all the evidence introduced on the trial of the cause. Nor is a statement or certificate of counsel of any greater weight or significance than any other document copied into the case. The court verifies and makes conclusive every recital contained in the case, but this rule does not apply to certificates of counsel or of other officers which may be incorporated into the case. This court said in *Sawyer Lumber Co. v. Champlin Lumber Co.*, 16 Okla. 90, 84 Pac. 1093: "There is a certificate of counsel that the case contains all the evidence; also a certificate of the stenographer that his transcript contains all the evidence, but neither of these certificates are authorized or recognized. The case itself must contain the positive averment by way or recital or other equivalent showing that it does

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contain all the evidence submitted or introduced on the trial of the cause, and in the absence of such recital this court will not review any question depending upon the facts for its determination." This rule is conclusive of the case at bar. Notwithstanding this rule, we may say that we have examined the whole record, and, upon the assumption that the case does contain all the evidence, we are of the opinion that the cause was rightly decided upon the law and facts, and that the plaintiff in error is in no position to complain.

The judgment of the district court of Kay county is affirmed, at the costs of plaintiff in error.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

FIRST NATIONAL BANK OF BARTLESVILLE V. GEORGE W. BLAKEMAN.

(Filed September 4, 1907.)

(91 Pac. 868.)

1. **WITNESSES—General Reputation—Evidence of Inadmissible, When.** On the trial of a cause to a jury, where the defendant testifies as a witness in his own behalf, and is not impeached in any manner recognized by the rules of evidence, it is reversible error to permit him to introduce evidence of his general reputation for truth and veracity.
2. **SAME.** The rule is stated in the opinion, as to when a party will be allowed to corroborate his own testimony by evidence of previous good character.

Error from the District Court of Pawnee County; before Bayard T. Hainer, Trial Judge.

Reversed and remanded.

Biddison & Eagleton, for plaintiff in error.

Wrightsmen & Fulton and *James B. Diggs*, for defendant in error.

Opinion of the Court.

Opinion of the court by

BURFORD, C. J.: The plaintiff in error, the First National Bank of Bartlesville, commenced its action in the probate court of Pawnee county against the defendant in error, George W. Blakeman, to recover judgment upon a promissory note for the sum of \$349.30, bearing date Jan. 21, 1902, payable to T. J. Milton or order, and purporting to be signed by Geo. W. Blakeman. The note was endorsed by Milton to the plaintiff in error, and, payment being refused after maturity, the bank sued Blakeman as maker of the note. Blakeman denied under oath the execution of the note. The cause went to the district court on appeal for trial *de novo*. The case was tried to a jury on the sole issue as to the genuineness of the signature of the maker of the note. A number of witnesses testified to the facts relevant to the issue, and the defendant Blakeman testified as a witness in his own behalf, denying unequivocally that he had signed or authorized the signing of the note sued on. No person testified to having seen him sign the note, and the payee, Milton, was not produced as a witness by either party. There was some testimony by experts as to the genuineness of the signature. There was no evidence offered for the purpose of impeaching the testimony of Blakeman, nor was there on cross-examination of Blakeman any attempt made to show that he had made contradictory statements, or that he had committed any criminal or immoral acts. No evidence was offered attacking his general reputation for truth and veracity. During the trial the defense offered several witnesses, and, after qualifying them as character witnesses, they were permitted to testify, over the objection and exception of the plaintiff, that the reputation of Blakeman for truth and veracity was good in the neighborhood in which he lived. The case was submitted to the jury, and verdict returned in favor of the defendant Blakeman. The bank filed a motion for new trial, in which it alleged as error the ruling of the court in admitting the evidence of the general reputation of the defendant. The motion was overruled and judgment

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rendered for the defendant. The bank appeals, and assigns as error the overruling of its motion for new trial.

But one question is presented or argued by counsel for plaintiff in error. The sole question for our determination is: Was it reversible error for the court to permit the defendant, whose character had not been attacked, to introduce evidence of his general reputation for truth and veracity? The plaintiff in error insists upon the extreme rule that it is never permissible to offer evidence of general reputation unless the general character for truth and veracity is attacked by the adverse party, while the defendant in error insists upon the other extreme, that anything which tends to discredit the testimony of a witness is an impeachment of the witness, and entitles him to offer testimony in support of his general reputation for truthfulness. Both parties are sustained by respectable authority, but we think neither of them suggests the safe rule. The question as to when and under what conditions a witness may be corroborated by evidence of general good character is one that has been as much discussed by text writers and jurists, and upon which there is as irreconcilable confusion, as many others found in the books in this country of many jurisdictions. This court has never been called upon to adopt a rule on the subject, and we feel it our duty to explore the field fully and select the path which seems to lead to the most logical and beneficial results. It is useless to attempt to reconcile the many judicial decisions upon the main subject and its related branches; nor would it be profitable to make a critical review of them. There are a few general principles which pervade all the adjudicated cases, and these have been carefully stated and learnedly considered by the eminent text writers on evidence, and we may safely base our conclusions upon a consideration of their labors. One of our earliest American writers upon the law of evidence, and one whom every lawyer and jurist of to-day venerates, Prof. Greenleaf, in vol. 3, sec. 469, (15th ed.) of his work, says:

“Where evidence of contradictory statements by a witness, or

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of other particular facts, as for example, that he has been committed to the house of correction, is afforded by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth. But evidence that he has on other occasions made statements similar to what he has testified in the cause is not admissible unless where a design to misrepresent is charged upon the witness in consequence of his relating to the party or to the cause, in which case it seems it may be proper to show that he made a similar statement before the relation existed. So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible. But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to character."

We find the subject thus discussed in Underhill on Evidence, sec. 352: "The direct impeachment of a witness by any of the means which have been above explained creates an issue respecting his general character for truthfulness. Evidence to support this and to show that he is a person in whose testimony the jury may have confidence is, therefore, relevant. But evidence of reputation is not relevant merely because there is a contradiction between adverse witnesses, or because the credibility of a witness is shaken on cross-examination, though its admission in such cases may not be reversible error. A distinction has sometimes been made by which it has been held that general evidence of the character of the witness for truthfulness is not relevant if he was impeached merely by showing that he had made contradictory statements. This distinction is repudiated by a majority of the decisions which support the proposition that general evidence of the character of the witness as a truthful person is always admissible whenever any attempt, though it may have been unsuccessful, has been made to impeach it, as for example, where another witness is asked what is his character for truth and replies it is good."

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In Jones on Evidence, vol. 3, sec. 870, the author, in discussing this question, says: "While it is clear that a direct attack upon the reputation of a witness admits evidence to sustain his credibility, the question whether such evidence is rendered admissible by collateral attack is involved in more difficulty. It has sometimes been held that, if it appears from the cross-examination of a witness that he has been guilty of immoral conduct or charged with a criminal offense, he may be sustained by evidence of good character for truth. So it was held that, when a witness was assailed by evidence that he had been suborned and paid for his testimony, his good character for veracity might be shown. So the same class of testimony has been received in an action on an insurance policy where the defendant had sought to prove that the plaintiff had burned his building and made false proofs of loss, and in an action for forgery where the defendant sought to prove that a witness for the state had himself committed the forgery, proof of the good character of such witness was allowed. As we have seen, although it is held in some of the cases that answers on cross-examinations which tend to disparage the character of the witness are sufficient to render admissible sustaining evidence of his good character, and although there is considerable authority in the decisions to support this view, the practice would undoubtedly lead to great confusion and the multiplicity of collateral issues unless carefully guarded by the discretion of the trial judge. It is well settled that, when either by cross-examination or other evidence that the witness has been convicted of a crime, his good reputation for truth since such conviction may be shown. And such testimony is not received where it appears that the witness was acquitted or merely charged with crime without a conviction. So where a witness admitted on cross-examination that he had been drunk on various occasions it was held that this did not render testimony admissible as to his general good character for veracity."

And in section 871 the same author says:

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"It has sometimes been held that, where proof has been offered of the inconsistent or contradictory statements of a witness, his credit may be sustained by proof of his good reputation for truth and veracity; that since the object of the attack is to impeach the witness, the mode of such attack is immaterial, and the same reason exists for sustaining the witness as where witnesses are called to testify to his bad reputation. But it is the better view, and one sustained by the weight of authority, that in such cases the witness cannot be fortified by evidence of good character. Although the contradiction in his statements may tend to show that he ought not to be believed in the particular case, this does not necessarily touch his general good character for truth or integrity, since the inconsistency may be the result of mistakes or forgetfulness. On the same principle, and perhaps for stronger reasons, it is no ground for the introduction of evidence to sustain the character of a witness that other witnesses have contradicted him by testifying to a different state of facts, and this remains true although the contradiction is of such a character as to incidentally impute immorality or crime."

That learned and scholarly jurist, Mr. Justice Elliott, upon the subject under consideration, in his work on evidence, vol. 2, sec. 995, says: "When the reputation of a witness for truth has been impeached, the party calling a witness has a right to call other witnesses to prove that his reputation is good. Good character, it has been held, may be shown where the witness has been impeached by proof of conviction of crime. But this principle is not always applied, at least where there is no real attack by way of impeachment. If the witness has been impeached by proof that he made contradictory and inconsistent statements out of court, some of the cases allow his good character to be shown in corroboration, while others refuse to admit such testimony. However, to render testimony of good character competent and admissible in support of the witness, an attack must necessarily have been made on his character." And in section 971, he proceeds to show how a witness may be impeached, by showing either by cross-examination or by opposition witnesses bias, malice, prejudice, interest or corruption: by showing inconsistent and contradictory

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statements of the witness; by showing general bad character or reputation for truth and veracity.

In Bradner on Evidence, sec. 16, it is said: "Testimony to support the character of a witness cannot be given in evidence unless the credibility of the witness is impeached."

Prof. Wigmore, in his critical and extensive contribution to the literature of the law, has gone over this subject more analytically and completely than any other text writer, and in section 1104 of Wigmore on Evidence, he gives us the following: "Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal character for veracity, just as he is assumed to be of normal sanity. Good character, therefore, in his support is excluded until his character is brought in question and it becomes worth while to deny that his character is bad. The question thus always arises, under the general rule, when is the witness's character brought into question by the opponent so as to open the way to evidence of good character in denial? This must depend on the nature of the opponent's impeaching evidence. It may be a direct assault on the witness's character, in which case no doubt exists. But it may be evidence of a doubtful or ambiguous import, for example, of bias, of a prior self-contradiction, of an error of fact, and so on through the whole series of kinds of discrediting evidence. It is obvious that the theory of each of these kinds of evidence must be considered before it can be said whether it affects the witness's character."

From these several statements of the law we think it a fair and reasonable deduction that when a witness has testified, and the opposite party has either upon cross-examination of such witness or by the introduction of independent testimony impeached such witness in any one of several particulars, it is competent to corroborate him by evidence of his general reputation for truth and

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veracity. But it is not every act of the adverse party which would have the effect to discredit the witness or his testimony that entitles him to such corroboration. The weight of modern authority seems to classify the cases in which evidence of general reputation in support of a witness is admissible practically as follows: First, where there has been a direct attack upon the character of the witness by offering evidence tending to show that his general reputation for truth and veracity is bad. This rule is universal and unquestioned. Second, where the witness has been impeached by evidence of particular acts of criminal or moral misconduct, either on cross-examination or by record of conviction. While this rule is not universally adopted by the American courts, it is supported by the following cases: *Lewis v. State*, 35 Ala. 386; *People v. Ah Fat*, 48 Cal. 61; *People v. Amanacus*, 50 Cal. 233; *State v. Fruge*, 44 La. Ann. 165; *Vernon v. Tucker*, 30 Md. 456. *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77; *People v. Rector*, 19 Wend. (N. Y.) 569; *Carter v. People*, 2 Hill. (N. Y.) 317; *People v. Gay*, 7 N. Y. 378; *Stacy v. Graham*, 14 N. Y. 492; *Webb v. State*, 29 Ohio St. 358; *Wick v. Baldwin*, 51 Ohio St. 51; *Warfield v. Ry. Co.*, 104 Tenn. 74; *Smith v. Tate* (Tex.) 50 S. W. 363; *Lutterell v. State* (Tex.) 51 S. W. 930; *Paine v. Tilden*, 20 Vt. 554; *George v. Pilcher*, 28 Gratt. (Va.) 299; *Reynolds v. R. R. Co.* 92 Va. 400; *Clark v. State* (Ga.) 43 S. E. 853; *Clark v. Bond*, 29 Ind. 555; *Warfield v. L. & N. Ry.* (Tenn.) 55 S. W. 304. Third, impeachment by evidence of corruption on the part of the witness in connection with the case in which he appears. Fourth, impeachment by evidence of contradictory or inconsistent statements admitted on cross-examination or shown by the testimony of other witnesses. Upon this last rule the authorities are in irreconcilable conflict, and are about equally divided, but the better reason seems to favor the right to corroborate the witness, whose evidence is in this manner discredited, by allowing proof of his general reputation for truth and veracity. *Hodge v. Gooden*, 13 Ala. 718; *Holly v. State*, 105 Ala. 100; *Mercer v.*

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State, 40 Fla. 216; *McEwen v. Springfield*, 64 Ga. 159; *Clark v. State*, 117 Ga. 254; *Paxton v. Dye*, 26 Ind. 394; *Clem v. State*, 31 Ind. 418; *Boord v. O'Conner*, 137 Ind. 622; *State v. Boyd*, 38 La. Ann. 374; *Davis v. State*, 38 Md. 15; *People v. Rector*, 19 Wend. (N. Y.) 583; *Isler v. Demy*, 71 N. C. 14; *Burrell v. State*, 18 Tex. 713; *Street v. Sherman*, 21 Vt. 23; *Stevenson v. Gunning*, 74 Vt. 601; *State v. Stoley*, 45 W. Va. 198.

There are other particular cases in which, in the exercise of a wise discretion, the trial court may properly allow evidence of general reputation of a witness in support of such witness, but there must be some special or particular element introduced into the case by the adverse party by which such witness is impeached or discredited. But the foregoing rules embrace the general classes of cases in which such practice is allowable. In the examination of the case under consideration, we find nothing in the evidence, nor in the cross-examination of the defendant, which brings the case within any of the adjudicated cases. The question as to whether he signed the note sued on was the vital and controlling question. He testified that he did not sign the note, that he did not see the payee on the day the note purported to have been executed, and offered other corroborating evidence to support his position. The bank offered some expert evidence upon the question of the identity of the signature, and attempted to prove that the defendant had made certain admissions from which it might be inferred that he had signed the note. There was nothing involving moral turpitude of the defendant in the transaction; if a crime had been committed, it was by the person who forged the note. It is not sufficient to entitle one to corroborate his evidence by general character that the facts to which he testifies are contradicted or disproved by other witnesses. The testimony introduced by the defendant that his general reputation for truth and veracity was good was liable to have great weight with the jury and to have influenced their verdict. It was reversible error to admit such evidence under the circumstances presented by the evidence in the case.

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The judgment of the district court of Pawnee county is reversed, at the costs of the defendant in error, and the cause remanded, with directions to grant a new trial

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent: all the other Justices concurring.

J. M. ROGERS V. MCCORD-COLLINS MERCANTILE COMPANY.

(Filed Sept. 4, 1907.)

(91 Pac. 864.)

1. **MOTIONS—Conclusiveness of Adjudication—Motion to Quash Service.** Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and if no appeal is taken, the matter arising on the motion to quash service becomes *res adjudicata* and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject matter.
2. **APPEARANCE—General Appearance—Special.** Where a motion is made in which questions are raised which go to the jurisdiction of the court over the parties, and in which questions are also raised which cannot be raised by special appearance but can only be heard upon a general appearance, the parties will be taken and held to have entered a general appearance, and in such case defects in the service of summons will be deemed and held to have been waived, even though such appearance be made after judgment and upon a motion to vacate and set aside such judgment.

(Syllabus by the Court.)

Error from the Probate Court of Lincoln County; before Fred A. Wagoner, Probate Judge.

Affirmed.

S. A. Cordell, and J. B. A. Robertson, for plaintiff in error.

S. D. Decker for defendant in error

Opinion of the court by

PANCOAST, J.: This action was brought in the probate court of Lincoln county to recover the sum of \$127.50. Summons was

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regularly issued and was served on the 24th day of November, 1904, by leaving a certificate copy thereof, with the endorsements thereon, at defendant's usual place of residence. On the 5th day of June, 1905, the plaintiff appeared specially and moved to quash and set aside the summons and service thereof, for the reason the defendant was not at the time of service a resident of the county or territory. Evidence was introduced upon this motion, and overruled by the court, and judgment was thereupon rendered as upon default. Following this, on the 15th day of June, 1905, the plaintiff in error filed a motion, supported by affidavits, praying that the judgment rendered on the 5th day of June be set aside, upon the ground that the defendant was a nonresident when service was made, and that the court had no jurisdiction of the person of the defendant. Evidence was introduced upon this motion also, and heard by the court, and after consideration thereof the court overruled the same. Time was given to make a case upon the last order. The case-made, however, contains the record of the action of the court upon the motion to quash as well as upon the motion to set aside the judgment, although no time was given to make a case upon the first motion. No extension of time having been given to make a case upon the ruling upon the motion to quash service, the action of the court in that regard can not be considered in this appeal, except in so far as the court may be apprised of the first action of the court, and in so far as it may be necessary to consider the same in connection with the subsequent orders. It seems, however, from the record, that this motion was heard, and upon the hearing that evidence was introduced and considered, which was held by the court insufficient, and the return of the sheriff and the service was sustained.

It is insisted by the plaintiff in error that both of these motions ought to have been sustained. There was, however, evidence offered and considered, and we think that the return of the sheriff was sufficient as against the evidence offered by the defendant. The affidavits offered by the defendant are very unsatis-

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factory. The affidavit of the wife of the defendant was incompetent and could not have been considered by the court. The other affidavits contain conclusion and evidently appeared to the court as evasive and unsatisfactory. Upon this, however, the only question that can be considered here is the question arising upon the motion to set aside the judgment. This same question, having been presented to the court upon the motion to quash service, became *res adjudicata*, and the court would have been justified in overruling the motion upon that ground, if none other. An order overruling a motion to quash summons and service is as conclusive on appeal from a subsequent order involving the same question, and becomes *res adjudicata* to the same extent, as if the order had been made upon the final judgment. Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and, if no appeal is taken, the matter arising on the motion to quash service becomes *res adjudicata* and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject matter. While there are exceptions to the letter of this rule, yet, whenever the exceptions have been recognized, they have been based upon what seems necessary for the full protection of the rights of the parties. "Orders made on motions affecting the substantial rights of parties from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issue necessarily decided, as are final judgments." *Halverson v. Orinoco* (Minn.) 95 N. W. 320; *Board of Commissioners of Wilson County v. McIntosh* (Kan.) 1 Pac. 572.

It is insisted by the plaintiff in error that a void judgment can always be attacked, even collaterally. As an abstract proposition of law this is probably correct, but this was not a void judgment. At most it was only voidable, and it is also true that the court upon a proper showing could have quashed the service,

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inasmuch as the service was not personal, but by leaving a copy at what was claimed as the usual place of residence of the defendant. This could only be taken advantage of by a special appearance, and should the defendant in such a case at any time make a general appearance, such general appearance would have waived any defect of service. Not only that, but a general appearance in such a case may be made even after judgment, and when so made will have the effect of waiving any defect which may appear in the service.

In the brief of the plaintiff in error in this case, they argue two propositions which can in no wise be taken advantage of by special appearance, and an appearance in any case which is designated as a special appearance, and in which special appearance propositions are contended for which can not be taken advantage of by a special appearance, but can only be heard upon a general appearance, the parties will be taken and held to have made a general appearance. Counsel argue, upon pages 10 and 11 of their brief, that the judgment was rendered without testimony; also, that the petition was not subscribed by the plaintiff in error, and for this reason the court erred in rendering judgment; also, the service was made on Thanksgiving Day. The first two of these propositions are not matters that can be considered under the head of a special appearance. They are matters that do not pertain to the jurisdiction of the person, and the defendant, having presented these two matters to the court, will be deemed to have entered a general appearance in the action, and, having entered a general appearance, all matters affecting the service are waived, and the court will be held to have jurisdiction of the person of the defendant.

There being no proposition that can be considered except those arising upon the motion to set aside the judgment, which proposition involves alone the question of service, and these matters having been waived by the general appearance, and the argument of the propositions not pertaining to the question of service and all

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matters pertaining to service being shown by the record to have become *res adjudicata*, and there being no other proposition presented to this court, the judgment of the probate court will be affirmed.

Irwin, J., absent; all the other Justices concurring.

ROBERT BARBE V. TERRITORY OF OKLAHOMA.

(Filed September 4, 1907.)

(81 Pac. 783.)

1. **LARCENY—Indictment—Felonious Intent.** In a prosecution for larceny of domestic animals, an indictment which charges that the defendants "did then and there unlawfully, wilfully and feloniously, by stealth, take, steal and carry away, without the consent and against the will of the true owner," certain personal property "with the unlawful and felonious intent then and there" of the defendants "to deprive the said L. C. Knee thereof and to convert the same to their own use and benefit," sufficiently charges a felonious intent to convert.
2. **JUDGES—Change of Judge—Powers of Substituted Judge.** Where an application for change of judge is granted on March 22, 1905, and the clerk of the district court of Comanche county is ordered to notify the clerk of the supreme court at Guthrie of such change of judge; and where, on the same day, at Woodward, Oklahoma, at chambers, an order is made by the chief justice assigning another judge to "hold the district court in the county of Comanche * * * and to try, hear and determine any, and all cases and matters that may come before him in said district during the absence" of the regular presiding judge therefrom—Held, the judge so assigned has jurisdiction to try, hear and determine any case or matter which may come before him while acting under such order of the chief justice.
3. **CRIMINAL LAW—Accomplices—Evidence—Corroboration—Sufficiency—Larceny.** Evidence of witnesses other than accomplices examined: Held, to be sufficient to tend to connect the defendant with the commission of the offense.

(Syllabus by the Court.)

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Error from the District Court of Comanche County; before B. F. Burwell, Trial Judge.

Affirmed.

Rose & Anderson, for plaintiff in error.

P. C. Simons, Attorney General, and *Don C. Smith, Assistant*, for defendant in error.

Opinion of the court by

GARBER, J.: The plaintiff in error, jointly with Charles Barbe, J. Stien, and Roy Barbe, was indicted by a grand jury of Comanche county, charged with the larceny of certain domestic animals. A demurrer to the indictment being overruled, upon application, a change of judge was granted, and also a separate trial for each defendant. On the 24th day of March, 1905, the jury returned a verdict finding the defendant guilty of stealing domestic animals as charged in the indictment. A motion for a new trial having been overruled, the defendant was sentenced to imprisonment in the territorial prison at Lansing, Kansas, for a period of eight years. From that judgment, plaintiff in error appeals, and asks a reversal thereof upon three assignments of error, viz.: First, the demurrer to the indictment should have been sustained. Second, the court was without jurisdiction. Third, the evidence was insufficient to support the verdict.

The first two assignments of error upon the same state of facts having been passed upon by this court in a very able opinion by Mr. Justice Pancoast in the case of *Charles Barbe* (one of the persons jointly indicted with the plaintiff in error in this case) *v. Territory*, 16 Okla. 563, 86 Pac. 61, renders a restatement of those questions raised by the assignment of error and conclusions of law thereon at length unnecessary at this time. In that case, as in this, it was urged that the indictment did not charge that the property was taken with the felonious intent to convert. The indictment charged that the defendants Charles Barbe, J. Stien, Robert Barbe, and Roy Barbe, then and there being, did, then and

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there, unlawfully, wilfully, and feloniously, by stealth, steal, take, and carry away, without the consent, and against the will of the true owner, two cows and eight steers and six young cows, the personal property of L. C. Knee, with the unlawful and felonious intent, then and there, of them, the said Charles Barbe, J. Stien, Robert Barbe, and Roy Barbe, to deprive the said L. C. Knee thereof, and to convert the same to their own use and benefit. In passing upon the sufficiency of the indictment Justice Pancoast, speaking for the court, said: "We are of the opinion that the indictment in this case fills the requirements of the law under the rule there enunciated. The unlawful and felonious taking, the unlawful and felonious intent to deprive the owner of the property and to convert the same to the taker's use, are allegations which are all contained in this indictment."

The second assignment of error in that case, as in this, challenged the jurisdiction of the chief justice to issue an order, while holding court at chambers, at Woodward, Oklahoma, designating Honorable Benjamin F. Burwell, associate justice of the supreme court, and presiding judge of the Third judicial district, to hold the district court of the county of Comanche of the Seventh judicial district, and to try, hear, and determine any and all cases and matters that might come before him in said Seventh district during the absence of the Honorable F. E. Gillette, the regular presiding judge, therefrom, for the reason that there had been no time sufficient for the clerk of the district court to transmit to the clerk of the supreme court at Guthrie a certified copy of the order granting a change of judge, and that the chief justice issued the order designating a judge without sufficient notice, it appearing that the change of judge was granted on March 22, 1905, and that the order issued by the chief justice was issued on the same day. In passing upon that question Justice Pancoast, speaking for the court, said: "While the statute provides that notice of an order granting a change of judge shall be transmitted to the clerk of the supreme court and shall be by him immediately presented to the

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court, if in session, or, if not, then to the chief justice, yet we are of the opinion that this provision is not the only one that may be pursued. The only purpose of this act is to give notice to the supreme court, if in session, or to the chief justice, if the court is not in session, that an order for a change of judge has been made; but if the court, if in session, or the chief justice, if the court is not in session, receives notice of such order in any other manner, we think the right clearly exists to act upon the notice, if the order for a change of judge has, in fact, been granted. The manner of giving or acquiring notice of the order granting a change of judge is not jurisdictional."

The remaining assignment of error is that the evidence was insufficient, and that the court should have sustained the motion of the plaintiff in error to instruct the jury to return a verdict of acquittal. It is claimed that the conviction was secured upon the testimony of accomplices, which was not corroborated by such other evidence as tended to connect the defendant with the commission of the crime; it being admitted that the testimony of the accomplices was amply sufficient to support the verdict, if sufficiently corroborated. An examination of the record reveals, not only the commission of this crime by the defendant, but ample corroboration thereof. Dr. L. C. Knee, the owner of the cattle, testified that he saw the defendant and others in a pasture about five miles southeast of Lawton on the day preceding the night they were stolen, April 24th. Mrs. Frances Davis testified that the defendant and his wife, and other parties, who were subsequently convicted of the stealing of these same cattle, were at her house on April 24th, and that the defendant, with other parties, left her house that evening, and did not return until the next morning, at about seven or eight o'clock. John Burton testified that he saw the defendant with other persons, driving the stolen cattle along about sundown in the direction of the ranch or big pasture where the defendant kept his cattle. George M. Rattan testified that he trailed the cattle into the mountains and found them among defendant's cattle

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on April 29th. From this brief statement of the substance of the testimony of disinterested witnesses, and from a careful reading of the entire record, it clearly appears that there was sufficient corroborating evidence tending to connect the defendant with the crime of which he was convicted and sentenced, and, when the corroborating evidence tends to connect the defendant with the commission of the offense, the requirements of the statute have been fully satisfied.

It clearly appearing that the defendant has had a fair and impartial trial, and that the evidence is amply sufficient to sustain the verdict, the judgment of the district court of Comanche county will be affirmed.

Burwell, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

J. A. WILLOUGHBY, *Receiver of the Capitol National Bank of Guthrie, Oklahoma*, v. E. P. KELLY.

(Filed September 4, 1907.)

(91 Pac. 874.)

APPEAL—Review—Evidence—Corporations—Stock Book—Conclusiveness. Where, as in this case, the contents of a bank stock book are relied upon to establish the fact that at the date of the bank's failure the defendant was a stockholder in the bank and liable as such, the contents of such book are not conclusive in the absence of testimony showing the same to have been accurately and correctly kept. And where the testimony as a whole throws doubt upon the facts sought to be established by the introduction of such evidence, and presents proof from which a conclusion may be adversely drawn, the conclusions of the trial court adverse to the conclusions sought to be established by such stock book will not be disturbed.

(Syllabus by the Court.)

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Error from the District Court of Logan County; before Bayard T. Hainer, Trial Judge.

Affirmed.

Flynn & Ames and R. A. Kleinschmidt, for plaintiff in error.

Strang, Devereux & Hildreth and Lawrence & Huston, for defendant in error.

STATEMENT OF FACTS.

This action was brought by J. A. Willoughby, receiver of the Capitol National Bank of Guthrie, to recover from the defendant one thousand dollars, the amount of the levy of the comptroller of the currency upon ten shares of stock of the said bank belonging, as alleged, to defendant. The assessment was made by the comptroller May 9, 1904. The defendant admitted the regularity and legality of the levy, but denied liability thereunder. From the proceedings had upon the trial of the case in April, 1905, it appeared from the stock book of the bank offered in evidence that the defendant, Kelly, was the owner of ten shares of the capital stock of the bank from and after January 31, 1902. The defendant, on becoming the owner of such stock, was elected a director of the bank, which position he filled for about a year. when he tendered his resignation in writing, which was accepted in November, 1903, at which date he claimed his entire connection with the bank as director and stockholder ceased, and therefore denies any liability for the assessment.

It appears from the record that the defendant, Kelly, was solicited by the president of the bank to become a director of the corporation, and that he consented, and, in order to qualify him for such position, the president of the bank, Billingsley, caused the transfer of ten shares of his stock from his name to that of the defendant, and thereafter the defendant qualified as a director, affirming in his oath of office that he was the owner of ten shares of stock in the bank. It appears, however, that the defendant was not in fact the real owner of the stock, and the same was never

Statement of the Facts.

delivered to him. Stock certificates were issued in his name, but the same were not signed by the president or attested by the corporate seal. When thus partially issued, they were placed in the vault of the bank, and were there found when the receiver took charge, and no dividends thereon were ever paid to defendant. The defendant testified that when the stock was issued in his name he immediately reassigned it, by signing a blank for the assignment thereof printed on the back of the stock certificate, but the blank for such assignment, printed on the stock found in the vault, was not signed. It is shown by the defendant's testimony that when he resigned as director he intended to sever all connection with the bank, including a retransfer of the stock to Billingsley. He was not present at the directors' meeting when his resignation was formally accepted in November, 1903, although the bank records show him to have been present. That he was in the city of Guthrie that day, and that he went to the bank, but upon arriving there was informed by the president that it was all over, and that one G. A. Nelson had been elected in his place. The defendant at the time asked the president of the bank if there was anything else for him to sign to show he had no interest in the bank, and he was told that everything had been signed, and that his stock had been transferred. Corroborating this testimony of the defendant, the record shows that on February 27, 1904, three months after the date upon which Kelley's resignation was accepted and his stock canceled, as stated by the president, Billingsley, a special stockholders' meeting was called and held. That at such meeting the owners of 960 shares were present, as follows:

A. G. Brower	400 shares	
C. R. Brooks	10 shares	
Chas. E. Billingsley	510 shares	
G. A. Nelson	10 shares	
J. C. Robb	30 shares	960
Absent stockholders:		
T. A. Neal	10 shares	
J. G. Edmonson	30 shares	40
Total	1000 shares	1000

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And at this meeting 53 per cent. assessment was levied upon all the stock of the bank.

From the testimony the trial court found the issues in favor of the defendant, and the plaintiff brings the case to this court alleging error. Other necessary facts are set out in the opinion.

Opinion of the court by

GILLETTE, J.: It is manifest that the only question to be determined in this case is as to whether or not the defendant was a stockholder in the Capitol National Bank at the time of its failure, April 4, 1904. From the facts stated, it must be conceded that he never was at any time a stockholder of the bank in good faith. This fact, however, does not relieve him from liability to the creditors of the bank to the extent that the law makes stockholders liable in case of the bank's failure, for he could not hold himself out as a stockholder, or knowingly permit the bank so to do, without assuming complete responsibility to the full extent that the law fixed liability upon stockholders in good faith. That in January, 1902, he permitted his name to appear as a stockholder in the bank and qualified as a director, upon the faith of his interest in the bank to the extent of ten shares, is admitted. That he continued in this relationship to the bank voluntarily until his attempted resignation in the summer of 1903 is settled by the record, and that he was liable to the creditors of the bank as an officer and stockholder until the 21st day of November, 1903, there can, we think, be no question. It is here, then, that the real contest in this case begins and turns upon the settlement of the question as to whether or not, when he resigned as a director of the bank, he relinquished and transferred the stock then carried on the books of the bank in his name; for the record does not show the bank to have been in a failing condition at that time, and does show his resignation as a director and the acceptance of the same upon that date. It further shows a purpose on his part at that time to entirely sever his connection with the institution.

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and, in considering the question as to whether he did so sever his connection, it must be remembered that he did not have actual possession of the ten shares of stock which had been assigned to him and carried on the books of the bank in his name. They were in the bank vault only partially filled out, but at that time, upon being informed by the president of the bank that he had been relieved as a director, he made inquiry if there was anything else necessary for him to sign to secure his complete release of any connection with the bank, and was informed by the president that there was not. This certainly barred him from any interest in or demand against the assets of the bank, and concluded the bank as a bank from demanding anything from him. He did not have possession of stock to cancel or surrender. He was relieved as a director and the stock which had been carried in his name, in fact belonged to the president, and the president informed him that nothing further was necessary. It is therefore a naked legal proposition as to whether or not he is liable upon an assessment against him by the comptroller of the currency. Section 12 of the national bank act provides:

“The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein.”

Was he, at the time of the failure of the bank, a stockholder? As between him and president, Billingsley, whose stock had been assigned to him, he was not, and, as between him and the bank for any profit of the bank, he was not. But it is urged that the stock book still showed him a stockholder. This book we understand from the evidence to have been originally a book containing blank shares of capital stock, with stubs which, when a share of stock is issued, is filled out giving a history of such issuance, and the proofs of record show that when the bank closed A. G. Brown was the owner of stock certificate 30 of 100 shares issued January, 1896; No. 31 of 100 shares issued January, 1906; and No. 63 of

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200 shares issued May 26, 1902, a new issue of stock not receipted for. C. E. Billingsley was the owner of certificate No. 53 of 25 shares, issued December, 1900; No. 54, 25 shares; 56, of 25 shares; 57 of 50 shares; 58, 50 shares; 59, 50 shares; No. 65 of 270 shares, issued May, 1902; a new issue not receipted for; No. 69, 75 shares issued March 1903; a reissue from original certificate No. 67 of 15 shares, and No. 71 of 10 shares issued April, 1904; a reissue of all of certificate 58; No. 71 of 10 shares, C. R. Brooks, issued January, 1902; a transfer from all of certificate 29; No. 60 of 30 shares, J. G. Edmonson; transfer from all of certificate 46. 47. 48, 49 and 51 issued January, 1902; No. 66 of 10 shares to T. A. Neal, issued March, 1903; a transfer of 10 shares from original certificate No. 55 issued for 25 shares; No. 70 of 30 shares issued to J. C. Robb, issued December, 1903; a reissue of all of original certificate No. 54; No. 62 of 10 shares to E. P. Kelly, issued January 31, 1902; a reissue of all of original certificate 32 and 52. As will be seen, these certificates named are for 1000 shares, the whole stock of the bank, and the defendant's ten shares of stock are included in the list. The record shows with reference to the introduction of this evidence:

"MR. KLEINSCHMIDT: We offer in evidence that part of the stock book showing the shares held by the various stockholders of the Capitol National Bank. THE COURT: It may be considered in evidence."

Then follows the certificate of which the foregoing in an abstract. No other parts of the stock book are shown in the record.

It is urged that this stock certificate book is a book of original entries, and therefore the best evidence of who the stockholders were at that time. Touching this question, we have to say that, as against the bank, it is probably the best evidence. The results to be ascertained from the book are such results as the book is made to speak through the methods in which it has been kept. There is no evidence in this record that the results deducible from this book are the facts in the case, or that the book has been correctly and accurately kept. We say, therefore, that as against the bank the

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result logically deducible therefrom is the best evidence, and as against the bank almost conclusive, but as against third persons adversely interested such effective application of record testimony of this kind cannot be made. A man's liability cannot be fixed by the bookkeeping of some other party, and in such case such testimony has weight or lacks weight according as the correctness of the bookkeeping is admitted or shown. In this case we have but a portion of the bank stock book before us, and no satisfactory conclusion can be deduced therefrom. It is confidently urged that just \$100,000 of outstanding stock was shown by the certificates hereinbefore described. That is true. But is this all and conclusive of the fact that such list of outstanding stock and stockholders measures accurately and conclusively what stock and stockholders were alone liable as such when the bank failed. The defendant's stock passed to his name January 31, 1902. We have no doubt but that the entire capital stock of the bank was at that time subscribed for and owned, and yet four months afterwards certificate No. 63 for 200 shares was issued to A. G. Brower and marked "a new issue." At the same time (May, 1902) stock certificate 65 to C. E. Billingsley for 270 shares, marked "new issue." This is approximately one-half the capital stock of the bank. It surely was not an original issue of stock, and what other stock is taken up by such new issue of stock is left wholly to conjecture. Stock certificate No. 66, for 10 shares, to T. A. Neal, issued March, 1903, was a transfer from original certificate No. 55, which original certificate was for 25 shares, and stock certificate 69, for 5 shares, to C. E. Billingsley, issued November 21, 1902, was a transfer from original certificate No. 61, which original certificate was for 15 shares.

It will be observed that this record evidence touching the last two named certificates shows that, at the time of the failure of the bank, there was outstanding, on certificate No. 55 and 67, 25 shares of the capital stock of the bank, and these are not included in the record offered to make up the 1000 shares of stock, which

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plaintiff claims was outstanding and alone liable. It will also be observed that stock certificate 67, with 10 shares thereof not accounted for in the record of the stock book offered in evidence, was issued long subsequent to the date of the plaintiff's certificate. The record is silent as to who it was issued to. If presumptions may be indulged in, it would be fair to presume that certificate 67, for 15 shares, was issued to Billingsley, and that afterwards he caused certificate 69 to issue for 5 of these shares. Such a presumption would show 510 shares in C. E. Billingsley. The facts are that the proofs offered from the stock book are most unsatisfactory and inconclusive. The trial court manifestly accepted the evidence touching the transactions of the bank on February 27, 1904, as more reliable, and which shows the stock of the bank outstanding at that time to be in Brower, Brooks, Billingsley, Nelson, Robb, Neal, and Edmonson, and on which date a 53 per cent. levy was made on the stock of the bank in the name of those persons as stockholders; Billingsley paying such assessment on 510 shares. We think the trial court had a right to adopt this view of the testimony, which by the well-settled rule of this court cannot be disturbed where a conflict in the testimony appears.

Under the conclusion here reached the principal ground set forth in the motion for a new trial is immaterial, which was that a letter, dated July 10, 1903, was signed by E. P. Kelly, and which signature he denied. This act of Kelly's, if admitted, would not change the conclusion here reached, for his connection with the bank was not concluded until the following November, when his resignation as a director was accepted, and at which time he was informed by the president of the bank that his connection with the bank was wholly severed.

Finding no reversible error in the record the judgment of the trial court is affirmed.

Hainer, J., who presided in the court below, not sitting; Irvin, J., absent; all the other Justices concurring.

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AMELIA M. HOLT v. A. H. CLASSEN, SAMUEL MURPHY, J. H. EVEREST, J. H. WHEELER, EWERS WHITE, C. W. RANSOM, FERDINAND BATCHELDER, AND THE CLASSEN COMPANY, a Corporation.

(Filed September 4, 1907.)

(91 Pac. 866.)

PUBLIC LANDS—Entries—Priorities—Premature Entry. A settlement or entry on public land already covered of record by another entry, valid upon its face, does not give a second entryman any rights in the land notwithstanding the fact that such entry may subsequently be relinquished or ascertained to be invalid by reason of facts *dehors* the record of such entry; and one first entering after the relinquishment or cancellation has priority over one attempting to enter prior to such relinquishment or cancellation. Following *McMichael v. Murphy*, 197 U. S. 304.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before James K. Beauchamp, Trial Judge.

Affirmed.

John S. Jenkins, for plaintiff in error.

J. H. Everest and O. T. Smith, for defendant in error.

STATEMENT OF FACTS.

The amended petition upon which this action is predicated sets forth that the plaintiff is the sole surviving heir of Levi Holt, who on or about the 11th of March, 1890, filed his soldier's declaratory statement and application to make homestead entry on the southwest quarter of section 27, township 12, range 3 W. I. M., in the proper U. S. land office in accordance with the laws of the United States and established rules of the land department. It appears from the petition and exhibits that one Ewers White was at the time a homestead entryman of the tract involved, that his entry had been contested by one Blanchard, and White's home-

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stead entry was held for cancellation by the commissioner of the general land office. Holt's declaratory statement and application to enter the land was made during the time, and while White had a right to appeal from the decision of the commissioner to the secretary of the interior, which appeal was in due time perfected and White's entry thereby preserved intact pending a determination by the secretary of the interior of the matters presented by such appeal. While the right of White to the land was pending before the secretary, White, on November 29, 1890, relinquished his homestead entry to the tract, and Murphy was allowed to make homestead entry thereon. The allowance of such entry at that time, and while Holt's application to file declaratory statement was pending and suspended, was held by the department of the interior to be erroneous; but, in view of the fact that Murphy's entry was of record, the department ruled that Murphy would be allowed thirty days from the date of notice to show cause why his entry should not be cancelled and Holt's application placed of record. This order brought on before the department a contest between Murphy and Holt which resulted ultimately in a determination by the secretary of the interior in favor of Holt's right to enter the land. Pending the contest between Holt and Murphy, Holt died, and his rights were revived in the name of Amelia M. Holt, plaintiff herein, as sole surviving heir, and she thereafter was represented before the department by the defendant, C. W. Ransom, who on June 14, 1897, and after the determination by the secretary of the interior of the right of the heirs of Levi Holt to enter the tract as a homestead, filed in the local office a waiver of the preference right of such heirs to make homestead entry of the tract in accordance with the decision of the secretary of the interior, and asked on behalf of such heirs to withdraw all claims in consideration (as recited in said waiver) of the receipt of \$2,000 to them in hand paid by Samuel Murphy, which waiver was signed by C. W. Ransom and acknowledged before S. M. Dilley, register of the local land office, and the de-

Statement of the Facts.

fendant Samuel Murphy was thereafter permitted to make homestead entry of the tract.

The petition of the plaintiff then alleges that the act of Ransom in waiving plaintiff's right was without her knowledge or consent; that no part of the consideration received by Ransom was ever paid to her; that she relied upon Ransom as her attorney to keep her informed as to her rights, but that he deceived her by concealing from her the fact that a preference right of entry had been awarded to the heirs of Levi Holt, and of the fact that he had entered a waiver of the right of said heirs to the tract as above stated; and that she did not discover the fraud until about the 8th day of September, 1901. The petition of plaintiff further recites that the defendants on the 14th day of June, 1897, conspired and confederated with the said Ransom to cheat and defraud plaintiff out of her right to said land, and acted together with said Ransom in executing and filing said waiver as above set forth, and charges that the defendant C. W. Ransom, for a consideration paid by the other defendants, and by the assistance and counsel of the other defendants, except the Classen Company, filed a waiver of all of plaintiff's rights to said land, in the local land office. It is further charged that on the 19th of January, 1898, the defendant fraudulently procured a patent to the land to be issued by the government to the defendant Samuel Murphy, and that he thereafter fraudulently conveyed 120 acres of said land to the other defendants, retaining to himself 40 acres thereof. The petition then in detail charges specific acts of fraud on the part of each one of the defendants (except the Classen Company) participated in by all the defendants, each and all of which acts were entered into, done, and performed with the intent and purpose of each of said defendants, thereby to cheat and defraud the plaintiff out of her right to enter said premises awarded her by the said decision of the secretary of the interior. The acts of the several defendants by which the plaintiff claims to have been defrauded consisted in manipulating the title to said lands by deeds

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and mortgages in such way as to place the same beyond the reach of any action by the plaintiff to recover the same, and as well also to distribute the value of said premises ratably among the said defendants. The value of said premises is alleged to be the sum of \$175,000, and to that extent the plaintiff alleges she has been damaged by the wrongful and fraudulent acts of the said defendants set out in the petition.

To the petition of the plaintiff each of the defendants filed their separate demurrers upon three grounds: (1) That the action was barred by the statute of limitations; (2) that it did not state facts sufficient to constitute a cause of action; and (3) that there is a misjoinder of parties defendant. The cause coming on before the trial court upon these demurrers, the court sustained the same as to each of the defendants upon the second ground, and from this ruling and judgment of the court the cause comes to this court for review, upon the error alleged to have been committed in sustaining such demurrers. The foregoing is a statement of the material facts set out in the petition and exhibits thereto attached.

Opinion of the court by

GILLETTE, J.: In considering this case, based upon the facts above stated, we shall consider the same in the light only as presented by the brief of the plaintiff in error, and in such brief the plaintiff in error states:

"There is but one question raised in this case: Did the application of Levi Holt to enter the land in controversy initiate a right to said land in favor of Levi Holt, which application was made, and received by the register and receiver of the local land office, and the legal fees tendered on the 11th day of March, 1890. and suspended on the same day, to await the determination of White et al., on appeal, said application being made four days after the final judgment of the commissioner, and before an appeal was taken to the secretary?"

This presentation of the issue narrows the question for our

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determination to the single proposition: Was the tendered entry of Holt rightfully received and held suspended at the time it was tendered March 11, 1890, and while the homestead entry of Ewers White remained intact upon the land?

It will be observed that Holt's application was not in any sense an application to contest the validity of any existing entry of or right to the land, but was an application to enter the same and file thereon a soldier's declaratory statement, which application was by the officials of the local land office received, but held suspended pending a complete determination of the then existing rights of White et al., under the entries which segregated the tract from the public domain. If the land was in fact segregated from the public domain at the time Holt tendered such entry, the local land office had no jurisdiction to accept another original right or application to enter the land, which in and of itself would be an act of segregation. It is true that one homesteader believing himself entitled to the land may enter a contest for the determination of such right against all existing entries or applications, but this is the extent of his right under such conditions. A tendered homestead entry or application to enter a tract of land already segregated from the public domain carries with it no legal right thereto. A homestead right to a tract of the public domain may be initiated in two ways: First, by an actual *bona fide* settlement upon the land; second, by a homestead entry thereof at the local land office. A valid initiatory right may be secured in either of these ways, and one is as effective as the other. The first of these inceptive rights that is exercised establishes an inchoate right to the land. If each of these rights is initiated at the same time by different persons, the land office will call a hearing to determine which, in point of time, was first, and award the land accordingly. If a tract of land already segregated from the public domain by an existing entry could have another valid right thereto attached, as an original homestead right, then such right might be initiated by set-

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tlement as well as by a tendered entry at the land office; but this proposition is squarely denied by the decision of the supreme court of the United States in *McMichael v. Murphy*, 197 U. S. 304, involving this same tract of land. In that case it appears that, while White's homestead entry was still intact, of record, McMichael, on June 3, 1889, attempted to initiate a homestead right thereto by establishing a residence thereon. He was ejected from the land, and the land having subsequently been patented to one Murphy, whose right thereto attached by a homestead entry allowed subsequently to the settlement right of McMichael, he (McMichael) brought suit against Murphy seeking thereby to have Murphy's title to the land held a trust for his use and benefit. This court denied him that right (*McMichael v. Murphy*, 12 Okla. 155, 70 Pac. 189), and the supreme court of the United States, reviewing this decision (197 U. S. 304), says:

"Following the adjudicated cases, we hold that White's original entry was *prima facie* valid, i. e., valid on the face of the record, and McMichael's entry, having been made at a time while White's entry remained uncanceled, or not relinquished, of record, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed, of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy."

It will be observed that the supreme court uses the word "entry" without distinguishing between a homestead entry at the land office and the initiation of a homestead right by settlement, but holds that lands are segregated by a homestead entry, from the public domain, and no valid entry can thereafter be made upon the land until it is restored to the public domain by a cancellation of the entry that segregated it. Following this decision of the supreme court of the United States, the supreme court of this territory, in *Holt v. Murphy*, 15 Okla. 12, 79 Pac. 265, a case involving this same tract of land, and the rights thereto of these same parties, held:

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“(1) A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and, so long as it remains a subsisting entry, precludes it from subsequent entry. (2) A homestead application to enter land already covered by a subsisting homestead entry can confer no right whatever upon the applicant. (3) Where an application to enter land already covered by a homestead entry is received by the local land office and rejected, and an appeal is taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, since the appeal cannot operate to create, as matter of law, any right not secured by the application.”

The rule thus laid down by this court is in accord with the determination of the supreme court of the United States in *Hodges v. Colcord*, 193 U. S. 192, wherein said court uses the following language:

“Gayman’s homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the president. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries.”

An examination of the case last cited shows that such an entry, although void, by reason of the disqualification of the entryman to make it, nevertheless operates to so segregate the tract involved from the public domain as to preclude the initiation of another homestead right to the same tract by entry, until the voidable entry has been canceled.

The authorities here cited, we think, justify the conclusion that the question presented in this case by the plaintiff in error should be determined in the negative.

The judgment of the court below is therefore affirmed.

Irwin, Garber, and Hainer, J. J., absent; all the other Justices concurring.

U. C. Guss v. Federal Trust Co.

U. C. GUSS V. FEDERAL TRUST COMPANY.

(Filed September 4, 1907.)

(91 Pac. 1045.)

1. **CONTRACTS—Legality—Public Policy—Railroads—Subscription in Aid.** A railroad company, for the purpose of aiding in the construction of its line of road, may accept and enforce an obligation payable to it, conditioned that the note shall become due and payable when the line of road is built and put in operation to a point named therein, and such a note is not void or against public policy.
2. **SAME—Parties to—On Whom Binding.** One who is not privy to a contract cannot be bound thereby against his consent to his detriment, nor can he claim the benefit of any of its favorable provisions.
3. **TRIAL—Verdict—Duty to Direct, When.** It is the duty of a trial court to direct a verdict for a party when the evidence is such that if a verdict were returned by the jury for the other party, the court under the law would be required to set the same aside.

(Syllabus by the Court.)

Error from the District Court of Logan County; before John H. Burford, Trial Judge.

Affirmed.

Cotteral & Hornor, for plaintiff in error.

Dale & Bierer and Hoyt, Dustin & Kelley, for defendant in error.

Opinion of the court by

BURWELL, J.: The Fort Smith & Western Railroad Company contemplated building its line of road from a point about forty miles west of the city of Fort Smith, in the state of Arkansas, to the city of Guthrie, Oklahoma, and the company, through its representatives, proposed that if the people of Guthrie would execute and deliver to it their respective notes of the aggregate value of fifty thousand dollars the line would be built to Guthrie.

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Notes were executed amounting in all to about fifty-four thousand dollars face value. The defendant executed and delivered his note, which was as follows:

“\$500.00

Guthrie, O. T., Feb’y 1st, 1902.

“The undersigned promise to pay to the order of Ft. Smith & Western Railroad Company, Five Hundred & No-100 dollars at the office of said company in Guthrie, Oklahoma.

“Provided always, that this note becomes due and payable when said Railroad Company shall have in operation a line of railroad from the present terminus of its line in the Indian Territory to the City of Guthrie, Oklahoma Territory.

“[Signed] U. C. Guss.”

The road was built on its own right of way to a point about two or three hundred yards north of the corporation boundary of the city, and from there its trains ran over the tracks of the Santa Fe Railway Company to the passenger depot of that company, which the Fort Smith & Western Railroad uses in common with such company. The note in question was transferred to the Federal Trust Company, and, payment having been refused by Mr. Guss, it commenced this action in the district court of Logan county, which resulted in a judgment in its favor, and the defendant has prosecuted this appeal.

The pleadings, the evidence, and the briefs cover a very wide range and present many supposed issues, which at first blush tend to impress one with the idea that the questions involved are difficult of solution; but when we take the facts as disclosed by the evidence and apply to them a few simple, well-established principles of law, the complications are imaginary, and not real. We have examined the record and briefs with a view of determining, if possible, what advantage, if any, was taken of the appellant in this transaction, but are forced to the conclusion that the real defense is the usual one of “ought not to pay,” under the assignment of error “that the obligation runs to a railroad company and public policy prohibits a railway company from accepting aid in the building of its road.” That a note or contract of the

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character involved in this case is not against public policy has been declared by this court after full consideration. The question is no longer an open one. *W. B. Piper v. Choctaw, Northern Townsite and Improvement Company*, 16 Okla. 436, 85 Pac. 965. In the case of *McGuffin v. Coyle and Guss*, 16 Okla. 648, 85 Pac. 954, 86 Pac. 962, decided some months prior to the case just referred to, this court recognized the validity of such contracts where made for the benefit of the railroad company, but by a divided court denied recovery in that particular case, for the reason that the contract on its face ran to an officer of the company, holding that that fact was sufficient to authorize the inference that the contract was made for the benefit of the officers of the company, and not for the benefit of the railroad company itself. By the terms of the contract in this case the appellant agreed to pay to the Fort Smith & Western Railroad Company five hundred dollars when that company (using the language of the contract) "shall have in operation a line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory." The road was built and in operation before this suit was commenced. It is true that it is insisted that the company had not built its line of road into the city; but it did not agree to do so. It agreed to build to the city of Guthrie, and the spirit of the contract is that the road should be built so as to afford the people of the city of Guthrie and those living in that community the advantages of such road as an independent line. Under the record this has been done. The contract has been substantially complied with. If it was the desire of those giving aid to the railroad company that it build and maintain separate and independent depot and terminal facilities, they should have so provided in their contracts. Under the record there has been a reasonable compliance with the contract on the part of the railroad company, and the appellant should pay the note, unless he can show some other defense.

But it is insisted that this and other notes were executed under the terms of another contract in writing, entered into between

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the railroad company and the citizens of Guthrie through and in the name of the Guthrie Club, of Guthrie, under date of February 20, 1902. The contract is as follows:

“Guthrie, Okla., Feb. 20, 1902.

“Contract and Agreement by and between the Fort Smith and Western Railroad Company and The Guthrie Club of Guthrie, Oklahoma.

“This contract and agreement entered into this 20th day of February, A. D., 1902, by and between the Fort Smith and Western Railroad Company, duly organized, incorporated, and doing business under the laws of the state of Arkansas and the Indian Territory and Oklahoma Territory, and for convenience hereinafter designated the party of the first part, and the citizens of the city of Guthrie, Oklahoma Territory, acting by and through The Guthrie Club, of Guthrie, Oklahoma, an organization duly incorporated under the laws of Oklahoma Territory having for its primary purpose the development of the business interests of the city of Guthrie, and which said Guthrie Club, of Guthrie, Oklahoma, is for convenience hereinafter designated the party of the second part.

WITNESSETH: That

“Whereas, said first party did on the 24th day of January, 1902, submit to the citizens of the city of Guthrie, Logan county, Oklahoma Territory, a proposition wherein and whereby said first party proposed and offered to extend its line of railway from its present terminus in the Indian Territory, to the city of Guthrie Logan county, Oklahoma Territory, provided, the citizens of said city of Guthrie would make, execute and deliver their promissory notes to said first party of the value of fifty thousand dollars (\$50,000.00) and also secure for the use and benefit of said first party the passage by the mayor and council of the city of Guthrie, such ordinances as should in the opinion of said first party be necessary and essential for the use of said first party in the construction and operation of its line of railroad in said city; and

“Whereas, said proposition as in substance above set forth was by the citizens of said city of Guthrie in a public meeting duly accepted, and in compliance herewith the citizens of the city of Guthrie have executed and caused to be executed promissory notes to the amount as shown by their face of approximately fifty-four thousand dollars (\$54,000.00) and have the same now ready for delivery, and the mayor and common council of said city of

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Guthrie have by the passage of ordinances permitted said first party to construct and operate its line of railway into and through the city of Guthrie, as requested by said first party; and

"Whereas, there being a question involved as to whether or not the promissory notes above and herein referred to are of the full value of fifty thousand dollars (\$50,000.00) in lieu of additional subscriptions and in payment by said first party of the sum hereinafter designated, the mayor and common council of said city of Guthrie have by resolution duly enacted, passed, approved and directed a contract to be entered into between the city of Guthrie and said first party herein named, whereby the said city of Guthrie shall, for a period of five (5) years from the 1st day of January, 1903, furnish a supply of water for the use of locomotives, yards and terminals of said first party; and

"Whereas, said first party for the purposes of convenience and to enable it to more readily carry out its purposes in building its line of railway as proposed and understood between the parties hereto, did on the 14th day of February, 1902, file articles of incorporation in the office of the secretary of the territory of Oklahoma and thereafter receive a charter under the name of The Fort Smith and Western Railroad Company in Oklahoma, permitting the construction of a line of railroad from the east line of Lincoln county in said territory to the city of Guthrie, therein, which line of railroad when constructed is to connect with and become a part of the present line of railroad now being operated and constructed and owned by said first party, and which said last mentioned line will when completed, be operated from Fort Smith, in the state of Arkansas, to the western boundary of the Creek Nation in the Indian Territory, and there connect with, and become a part of, the line of railroad to be constructed and operated in Oklahoma Territory as hereinafter described and set forth:

"NOW, therefore, for the purpose of fully carrying out and expressing the purposes and intention of the parties hereto and in consideration of the surrender to said first party of the promissory notes hereinbefore mentioned, and in further consideration of the ordinances enacted and resolutions passed by the mayor and council of the city of Guthrie, and the further promise upon the part of said second party to cause the passage and enactment of such other ordinances upon the part of said mayor and council as

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may be found necessary for the construction and operation of said line of railroad in said city of Guthrie, said first party hereby stipulates and agrees to and with said second party that it will within ninety (90) days from the first day of February, 1902, begin the work of grading for its line of railroad as above described between the city of Guthrie and a point on the St. Louis and San Francisco Railroad, between the city of Chandler, Oklahoma, and a point five (5) miles west of the city or town of Wellston in said territory; that its entire grade for its line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory, shall be completed within fifteen (15) months from February 1, 1902, and that said line of railroad from the terminus above named in the Indian Territory, shall be constructed and in operation within eighteen (18) months from said 1st day of February, 1902.

"The party of the first part hereby executes the above and foregoing contract this 20th day of February, 1902.

"THE FORT SMITH AND WESTERN RAILROAD COMPANY.

"By GEO. HAYDEN, Its President.

"The party of the second part hereby executes this contract this 20th day of Feby., 1902.

"THE GUTHRIE CLUB, of Guthrie, Oklahoma.

"By C. M. BARNES, Its President.

"ATTEST: FRANK B. LUCAS, Secretary. [SEAL]"

The appellant has misapprehended the scope of this contract. So far as the five hundred dollar contract is concerned, it has absolutely nothing to do with this contract, and the appellee's rights to recover are found entirely outside of any of the provisions contained in the one just quoted above. The appellant's contract for the payment of the \$500 is a contract direct with the railroad company, and its terms cannot be enlarged or restricted by anything found in the contract between the railroad company and the Guthrie Club. The appellant's contract is conditioned upon the performance of two things: First, that the road be built; and, second, that it be put in operation. There is not even any time stated when these things shall be done. The most that can be said is that the railroad company could bind the appellee only upon

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compliance with the terms of the contract within a reasonable time. That is not true with the contract with the Guthrie Club. It fixes a time in which the railroad company shall perform the things named therein. Perhaps it will be well to analyze its provisions briefly.

The first statement is that the contract is between the Fort Smith and Western Railroad Company and the Guthrie Club, of Guthrie, Oklahoma. In the next sentence it recites the contract is with the Fort Smith and Western Railroad Company and the citizens of the city of Guthrie, Oklahoma Territory, acting by and through the Guthrie Club, of Guthrie, Oklahoma, having for its primary purpose the development of the business interests of the city of Guthrie. The question at once arises: Who is meant in the contract by "the citizens of the city of Guthrie"? The position that it refers to those who signed the notes is not tenable, for, if those contracting intended to protect the interests of that class alone, they would have said so in plain and unambiguous words. And, again, that class had individually contracted with the railroad company direct. They had not appointed the Guthrie Club as their agent, and the club did not assume to act for them. They claimed to represent the citizens of Guthrie—those who had not contributed, as well as those who had. The club was not acting for those who gave their notes, but was looking after the building up of the city, and with that object in view it made a contract with the railroad in its own name, for it could not contract on behalf of the people as a whole in the name of the citizens of Guthrie, because the entire people can contract only through their duly elected or appointed officers. We shall not at this time attempt to express any opinion as to the legality of this contract with the Guthrie Club, and shall discuss its provisions only in so far as it appears necessary to determine its bearing upon the contract executed by the appellant. However, the more the contract is examined, the more unsound appears the appellant's contention.

We come now to a consideration of the substance of the con-

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tract itself. It provides that "whereas, the railroad company proposed and offered to extend its line of railway from its present terminus in the Indian Territory to the city of Guthrie, provided the citizens of that city would make, execute and deliver their promissory notes of the value of fifty thousand dollars to the railroad company and also secure for the use and benefit of the railroad company the passage by the mayor and council of the city of Guthrie such ordinances as should in the opinion of the railroad company be necessary and essential for the use of the company in the construction and operation of its line of railroad in the city." The contract then recites that the citizens of Guthrie at a public meeting accepted the proposition of the railroad company, and that the ordinances permitting the company to construct and operate its road into and through the city of Guthrie had been passed and notes of the face value of fifty-four thousand dollars had been executed and were now ready to be delivered. Here is where we come to the vital portions of the contract—those portions which show what the parties had in mind at the time, and the considerations which led to the making of the contract. A doubt had arisen in the minds of the parties interested as to whether the notes that had been executed, although of the face value of fifty-four thousand dollars, were in fact worth fifty thousand dollars, and, instead of securing more notes, the city of Guthrie, by its mayor and common council, passed a resolution whereby the city, for a period of five years from the first day of January, 1903, was to furnish a supply of water for the use of locomotives, yards, and terminals of the railroad company. The language of this particular clause of the contract is as direct and positive as it is possible for language to make it. Let us read it in this connection:

"Whereas, there being a question involved as to whether or not the promissory notes above and herein referred to are of the full value of fifty thousand dollars, in lieu of additional subscriptions and in payment by said first party of the sum hereinafter designated, the mayor and common council of said city of Guthrie have by resolution duly enacted, passed, approved, and di-

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rected a contract to be entered into between the city of Guthrie and said first party herein named, whereby the said city of Guthrie shall, for a period of five (5) years from the 1st day of January, 1903, furnish a supply of water for the use of locomotives, yards, and terminals of said first party."

Then follows the last clause of the contract. It says:

"Now, therefore, for the purpose of fully carrying out and expressing the purposes and intentions of the parties hereto, and in consideration of the surrender to said first party of the promissory notes hereinbefore mentioned, and in further consideration of the ordinances enacted and resolutions passed by the mayor and council of the city of Guthrie, and the further promise upon the part of said second party to cause the passage and enactment of such other ordinances upon the part of said mayor and council as may be found necessary for the construction and operation of said line of railroad in said city of Guthrie, said first party hereby stipulates and agrees to and with said second party that it will within ninety (90) days from the first day of February, 1902, begin the work of grading for its line of railroad as above described between the city of Guthrie and a point on the St. Louis & San Francisco Railroad, between the city of Chandler, Oklahoma, and a point five (5) miles west of the city or town of Wellston, in said territory; that its entire grade for its line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory, shall be completed within fifteen (15) months from February 1, 1902, and that said line of railroad from the terminus above named in the Indian Territory to the city of Guthrie in Oklahoma Territory, shall be constructed and in operation within eighteen (18) months from the 1st day of February, 1902."

Then the contract is signed "The Fort Smith and Western Railroad Company, By Geo. Hayden, Its President," and "The Guthrie Club, of Guthrie, Oklahoma, By C. M. Barnes, Its President. Attest: Frank B. Lucas, Secretary. [SEAL]"

The Guthrie Club had in its possession these notes for fifty-four thousand dollars. It had also secured the passage of certain ordinances and agreed to secure the passage of others if they became necessary. And in consideration of these ordinances and

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the delivery of these notes the railroad company agreed to complete its road and have it in operation within a certain time. These notes, however, were to be delivered as they were originally executed and as they then existed. The contract nowhere attempts to modify the terms and conditions of the notes, and the contention of the appellant that this contract with the Guthrie Club is void as against public policy, in that it is agreed therein to secure legislation from the city council, may, for the sake of argument (but for that purpose alone at this time), be conceded, and still the appellant is bound on his note. Although this contract recites in one place that it is executed by the Guthrie Club for the citizens of Guthrie, it is apparent, and such is the legal effect, that it executed the contract for and on behalf of itself, and the promise to complete the road and have it in operation within a stated time is a promise to the club, and not a promise to either the city of Guthrie or its citizens as a municipality, or to the makers of the notes.

What consideration flowed from Guss to the railroad company for the promise in this contract that the road should be built and in operation within the time stated therein? It cannot be said to be the five hundred dollars, because he had already agreed personally in the note signed by himself to pay that when the road was built and in operation. And this note specified no time for the building of the road. If the Guthrie Club had agreed in this contract that the appellant and others giving notes should contribute an additional sum in the event that the railroad company failed to realize fifty thousand dollars on these notes—that is, that he, together with those who were responsible, should increase the amount of their respective notes *pro rata* and make up the sum which the railroad company failed to collect—would it be presumed that this appellant would not, if sued upon this contract, deny the power of the club to bind him? Of course he would, and no court would hold that the club had such power under the facts disclosed by this record. If the club could not change the

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terms of his note so as to increase his liability, it could not by a separate, independent contract, executed without express authority from him, reduce his liability below that to which he had agreed in his note.

The Guthrie Club, after the railroad company failed to complete the road within the time specified in the contract which we have been considering, made another agreement with the railroad company extending the time for completing the road and putting it in operation. This contract is also discussed at some length by both parties, but it is not necessary to consider it. Having held that Mr. Guss was not privy to the first contract made between the railroad company and the Guthrie Club, he could have no interest in its subsequent modification.

It is also contended by appellant in his brief, as well as alleged in his pleading, that there was no consideration for the note in question, for the reason that the railroad company had concluded to build the line to Guthrie before the proposition was made by the company's officials that it would do so if the citizens of Guthrie would give notes of the value of fifty thousand dollars. Even if this were true it would not defeat recovery, unless representations were made which deceived the appellant, and without which representations he would not have given the note in controversy. We have read appellant's evidence carefully, and are fully satisfied that he was not deceived. In fact, he does not claim that he was deceived.

From these observations it necessarily follows that the judgment of the lower court should be affirmed. In the business world nothing is more sacred than the right of contract. And one of the highest duties of courts is to compel obedience to their terms by those who make them, when there exists no valid reason for relieving either of the parties from the performance of the conditions thereof. And in these times, when much is being done to enforce railroads to conform to the law and respect *their* obligations, care should also be exercised to the end that, through passion and prejudice, they be not deprived of that to which they

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are lawfully entitled. The evidence in this case discloses that the appellant is a man of experience, and that he has in the past been interested in making contracts of a similar character to the note in controversy. He has offered absolutely no legal excuse why he should not pay this note. Therefore the law, through its agencies, will compel him to do so. The trial court properly directed a verdict for plaintiff. A judgment for the defendant, under the evidence, could not have been sustained.

The judgment of the lower court is hereby affirmed.

Burford, C. J., who presided in the court below, not sitting; Hainer, J., not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

TERRITORY OF OKLAHOMA, *ex rel* CITY OF OKLAHOMA, v. J. M. ROBERTSON AND HOWARD HAYS.

(Filed September 5, 1907.)

(92 Pac. 144.)

1. **INTOXICATING LIQUORS—Licenses—Refusal by City.** Where a dealer in intoxicating liquors has obtained a county license authorizing him to sell such liquors within a city of the first class, such city has no power to refuse a city license to such person upon presentation of his county license, filing his bond with the county clerk, and paying to the city treasurer the amount required by the city ordinance for such license.
2. **SAME—Qualifications of Licensee—City Cannot Prescribe Additional.** The qualifications of one who has obtained a county license has been determined, and the mayor and city council of a city of the first class have no power to by ordinance prescribe additional qualifications.
3. **SAME—Municipal Regulation of Sale.** The mayor and city council of a city of the first class may by ordinance regulate the places where intoxicating liquors are sold and may designate the portions of such city where saloons may be conducted and where they may not, and an applicant for county license in such city must take notice of such ordinance when properly enacted and published.

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4. **SAME—Unlawful Sale—Nuisance.** The unlawful sale of intoxicating liquors does not ~~per se~~ constitute the place where such liquors are sold a public nuisance. The character of the place must depend upon the special facts, which must be specifically averred and proved.
5. **SAME—Abatement and Injunction.** There is no statute in this territory authorizing a court to proceed by injunction to restrain the unlawful sale of intoxicating liquors, and a court of equity will not interfere upon the bare fact alone that the place where liquors are sold is unlicensed.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before B. F. Burwell, Trial Judge.

Affirmed.

R. G. Hays, Co. Att'y, and G. A. Paul, City Att'y, for plaintiff in error.

Ledru Guthrie, for defendant in error.

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BURFORD, C. J.: The city of Oklahoma City brought this action in the name of the territory of Oklahoma, as relator, against J. M. Robertson and Howard Hays, the defendants in error, to enjoin them from conducting a saloon for the sale of intoxicating liquors within the corporate limits of the city. On May 2, 1905, the mayor and city council adopted Ordinance No. 484, entitled "An ordinance regulating the sale of liquors and providing penalties, and repealing Ordinance No. 260 of said city." This ordinance prohibits the sale of intoxicating liquors within the city by any person without first having procured a license from the mayor and city council and paid therefor into the city treasury the sum of five hundred dollars per year, in advance. Section 2 of the ordinance is as follows: "It shall be necessary for each person applying to the mayor and city council of said city for a license to sell liquors hereinbefore mentioned, to present to said mayor and city council the license issued, or a certified copy thereof by the county commissioners of said county to the applicant, together also

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with a petition signed by the owners of two-thirds of the lots within the one-half block running to the main alley in which the applicant intends to engage in business, setting out that the applicant is a person of good moral character, which place must be fully described by the lot and block number, the number being set out in said petition. Provided, that when any lot or lots are owned by two or more persons jointly, each person so interested shall be entitled to sign for his proportionate part of said lot or lots, and said mayor and council, upon being satisfied that such license has been issued to the applicant, and that he or she is a person of good moral character, and that the signatures of those whose names are signed thereto represent two-thirds of the lots on the side of the streets, running to the main alley, of the one-half block in which said business is to be carried on, may grant to him or her a license, by a majority vote of said council, to sell such liquors upon the payment of the necessary license money as required by section one of this ordinance. Provided, that no license shall ever be granted by said mayor and city council to any person to sell liquor within fifty feet of any church, or one hundred yards of any public school building within the city limits of said city."

Section 3 provides penalties for violation of this ordinance by fine and imprisonment.

The defendants in error made their application to the county authorities and procured their county license, and then paid to the city clerk the sum of \$500 and proceeded to engage in the liquor business without further effort to comply with this ordinance. The city refused to issue them a license until they should present their petition as required in the ordinance, and hence no city license was issued to them. This action is brought to enjoin them from conducting said business. It is alleged that they are selling intoxicating liquors in violation of the ordinance above set out, and the relief is asked upon the grounds that it will avoid a multiplicity of law suits. There are no facts set out in the petition showing equitable grounds of interference, except what we

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have stated. The district judge granted a restraining order until a hearing was had, when he dissolved the restraining order and refused the application for a temporary injunction. From this order the appeal is taken.

The plaintiff in error contends that under section 388, Wilson's Statutes, the city has power to prescribe the conditions upon which license may issue. It is there provided: "The city council shall have power to restrain, prohibit and suppress tippling shops, billiard tables, bowling alleys, houses of prostitution and other disorderly houses and practices, games and gambling houses, desecrations of the Sabbath day, commonly called Sunday, and all kinds of public indecencies. No license shall ever be granted for any house of prostitution, or for any gambling house, gambling device, game of chance, or any disorderly house or practice * * *"
This statute was adopted from the state of Kansas and had been construed by the supreme court of that state in an opinion by that eminent jurist, Mr. Justice Brewer, long before we adopted it (*City of Emporia v. Volmer*, 12 Kan. 622), and we adopted it with the construction placed upon it by that state. After quoting the section of the statute, which is identical with section 388 of Wilson's Statutes 1903, the court says: "We think this gives ample authority (to license). The word 'restrain' it not synonymous with 'prohibit' or 'suppress'. It does not contemplate an absolute destruction of the business, but rather placing it within bounds. From the last clause, which prohibits a license to houses of prostitution, etc., it seems evident that the legislature contemplated that the first granted power to license."

This same question has been presented to the courts of other states, and with like ruling. *City of St. Louis v. Smith*, 2 Mo. 113; *Trustees of Clintonville v. Keeting*, 4 Denio (N. Y.) 341; *Town of Mt. Carmel v. Wabash Co.*, 50 Ill. 69. In the opinion in this last case the court, on page 73, uses this language: "The power is to tax, restrain and suppress the sale of liquors; and under the power to tax, we think it was intended to confer the power to

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license tippling houses, but if this were not so, the power to restrain manifestly authorizes the city to grant such license. To restrain, the city would be compelled to adopt ordinances for the purpose, and by that means bring drinking houses under the necessity of procuring license and paying therefor such sums as might be required. Such a requirement would be a restraint reasonable and in accordance with the restraints imposed then and now on the traffic, and such restraint was doubtless in the contemplation of the general assembly when this charter was granted. It is, no doubt, true that the city was empowered to resort to other means of restraint, such as requiring such houses to be orderly, and in other respects to conform to such ordinances as might be adopted to properly restrain the business; but the fact that they had other powers conferred for the purpose in nowise prevented the city from exercising the power to restrain the general free sale of liquor by requiring that a license should be obtained before it could be sold."

A "tippling house" is a place where intoxicating liquors are sold and drank, where people tipple or drink intoxicants at the place. The drinks may be either sold or given away. *Werner v. Washington*, 29 Fed. Cases, 705; *Lessburg v. Putman*, 103 Ga. 110; *Woods v. Commonwealth*, 40 Ky. 74; *Yankton v. Douglass*, 8 S. D. 441; *Morrison v. Commonwealth*, 37 Ky. 218; *Patten v. Centralia*, 47 Ill. 370; *Harris v. People*, 21 Colo. 95, 39 Pac. 1084; *Emporia v. Wolmer*, 12 Kan. 622. And in the last case it is said: "That idea of counsel for the defendant that a tippling shop is technically 'a disorderly house, a nuisance,' and that therefore some facts must be shown from which disorderly conduct could at least be inferred, does not seem to us correct. Both terms 'tippling shop,' and 'disorderly house' have in the law well settled and well defined meanings, and those meanings are not identical, nor is either necessarily included in the other."

It would seem from these definitions that a "tippling shop" is the modern common saloon, where liquors are kept and sold as a

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beverage and drank at the bar, and it may be either a licensed or an unlicensed saloon, and that under the power granted in section 388, *supra*, the mayor and council may license the business, may prohibit the sale by those not licensed, and may suppress unlawful sales or disorderly houses where it is sold or kept for sale. But, in licensing a dealer, sec. 388 must be constructed in conjunction with section 3240 of the liquor law. This law was adopted from Nebraska, and is a later enactment than that regulating cities of the first class and must be construed with it. It provides: "It shall be competent and lawful for any incorporated village or city within the county where such bond is filed and license granted, to prohibit the party so licensed, as well as others, from engaging in the business of selling intoxicating liquors at retail within the corporate limits or within two miles thereof, until he shall obtain from the villiage, town or city authorities a license, and pay into the village, town or city treasury such sum as may be fixed by ordinance to be not less than one hundred dollars nor more than five hundred dollars. Provided, that no additional bond shall be required, nor shall any license be granted by the authorities of any such village, town or city, to any one who has not filed the required bond with the board of county commisioners and obtained from such board a license; and provided further, that no license shall run for a longer period than the license granted by such board; and the revocation of the county license by the board of county commissioners shall work a revocation of any license granted under the provisions of this section."

There is no conflict between these sections. Upon the other hand they are consistent and harmonious. Here the city council is again empowered to by ordinance prohibit the sale of intoxicating liquors by any person until they shall have obtained a city license, and they are not entitled to a city license until they have procured a county license. But does the possession of a county license entitle the holder to a city license? It is contended by the city that it may prescribe additional qualifications for the

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applicant and fix different requirements. Upon the other hand, counsel for the defendants in error contends that the city has only the power to assess a tax for revenue purposes against the liquor dealer, and has no further powers. We cannot accept either of these contentions. The mayor and city council are expressly authorized to grant a license; they fix the amount of the license fee, and must require the applicant to produce his bond and county license before granting him a license. The statute prescribes the qualifications of an applicant for a city license, he must be a man having a license from the county authorities, and have filed his bond with the county clerk; he must have paid to the city treasurer the sum prescribed by ordinance for a city license. Such a person is entitled to a city license, and the mayor and city council have no power or authority to prescribe any additional qualifications or requirements. It does not follow that the mayor and city council may not, under their grant of power contained in the general law under which it is incorporated, "to enact ordinances to restrain, prohibit and suppress tippling houses", adopt such ordinances as may be just and proper for the regulation of the places where liquors are sold. Nor do we intend to hold that they may not by ordinances prescribe the portion of the city where liquors may or may not be sold; these matters do not go to the qualifications of the persons to have a license.

It is next contended upon the part of the city that the defendants in error, having failed to procure a license from the city, were engaged in an unlawful business and that each sale made by them is unlawful as being in violation of the ordinance in question. The defendants in error contend that, having done all that the law requires of them to obtain a license, they are entitled to a license and in the same position as if the license had been granted. The statute is that the city authorities may prohibit the sale of liquors by either a licensed or unlicensed dealer until he shall obtain a license from the city authorities. The city, by section 1 of Ordinance No. 484, has made it unlawful for any one to

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sell intoxicating liquors within the limits of two miles of the city. "Within the limits of two miles thereof" does not mean within the city, but within a two miles limit without the city. If this is not true, at what point would one begin to measure to find a two mile limit within the city? This may be error in the copy we have before us, but such is the record, and the defendants cannot be guilty of any wrong under the provisions of section 1. The next section is set out *supra*, and relates to the procedure for obtaining a license, and we have already held a portion of that section in excess of the powers of a city council and to that extent void. Section 3 provides: "Any person or persons who shall, within the limits of said city or within two miles thereof, sell or give away any malt, spirituous, vinous or mixed liquors, without having first taken out a license from said mayor and city council, *as heretofore provided*, shall be deemed guilty of a misdemeanor and upon conviction thereof," etc., "shall be fined," etc. The words "*as heretofore provided*," in this section, should be construed as heretofore lawfully and legally provided, and only embracing such portions of section 2 as are within the powers of the mayor and council to enact; and thus construed, section three contains a valid prohibition against the sale of intoxicating liquors within the city without a city license.

One or two courts have held that such a compliance with the law by an applicant for license as entitles him to a license is equivalent to having the license, but this is not the general rule, and such holding is in that class of cases where the law treats the license fee as a tax or revenue provision rather than as a license. The rule is stated in 23 Cyc. 120, as follows: "Compliance with all the conditions necessary to obtain a license is not equivalent to the actual issue of the license. Although a person may have presented a proper and sufficient application, executed the required bond and tendered the proper fee, he can not legally begin selling until he has received the license." And this is supported by the following adjudications: *State v. White*, 23 Ark.

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275; *Roberts v. State*, 26 Fla. 360; *Franklin v. Stringham*, 56 Ill. App. 94; *People v. Gault*, 104 Mich. 575; *Jorden v. Besspalec*, 85 Minn. 441; *State v. Huntley*, 29 Mo. App. 278; *Shea v. Muncie*, 148 Ind. 14; *Curry v. State*, 28 Tex. App. 477, 13 S. W. 773.

Conceding for the purpose of the argument that the defendants in error were selling liquor in violation of a void ordinance, will injunction lie to restrain them from conducting such unlawful business? The courts of some states have granted such relief. In *Loftin v. Collins*, 61 L. R. A. 150, the Georgia supreme court held that the unlawful sale of intoxicating liquors constitutes a public nuisance and granted an injunction. The general rule is that the keeping of a place where intoxicating liquors are sold, either lawfully or unlawfully, does not constitute such place a nuisance *per se*. It is the disorderly character of a place that constitutes it a nuisance. If dissolute persons are permitted to congregate about a place where liquors are kept, and engage in drinking, tippling, carousing, swearing, hollowing and otherwise disturbing the peace and quiet of the neighborhood, such place was a nuisance at common law, and the keepers might be proceeded against either criminally or by suit to enjoin. Joyce, Law of Nuisances, sec. 400. But the question as to whether a saloon or place where liquors are sold or kept for sale may be enjoined or restrained as a nuisance is governed almost entirely by statute, and many of the states have authorized special proceedings by injunction to abate places where liquors are unlawfully kept or sold. We have no such statutes in this territory. We have statutes defining what are public and what are private nuisances, but the unlawful selling of intoxicating liquors is not designated as a nuisance; whether such place is a nuisance must depend upon the manner in which it is kept, and this is a question of fact to be specially alleged and proven.

In that valuable treatise on the law of Nuisances, by Joyce, the rule of equitable intervention is thus stated in section 415: "Outside of those statutes which confer equitable jurisdiction or

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give an equitable remedy or relief, as may be instanced by the case of a liquor nuisance, the controlling principles are that equity will interfere where the injury or mischief are irreparable and there exists no adequate remedy at law or no redress at law wherein the damages can be measured or where there can be no adequate compensation in damages, or where such exercise of jurisdiction is necessary to prevent multiplicity of suits, or oppressive, protracted, expensive and interminable litigation. An injunction may, however, issue in case of a nuisance *per se*, or to prevent a serious injury to health, or in case of imminent danger or where the nuisance is a continuing or constantly recurring one. But it is also determined in numerous cases that the right and the injury should be established by satisfactory evidence; that is, the right should be clear, manifest and strongly established, and not doubtful, probable, contingent, consequential, remote, uncertain, speculative, or merely apprehended, and that the injury or damage should be real, material, substantial, serious, exceptional, certain, immediate, and the danger imminent; or, as some of the courts express it, there should be a strong case of urgent or pressing necessity. It is further declared that equity will exercise caution in abating or enjoining a nuisance."

The petition in this case contains no such averments as Mr. Joyce says are required in states where there are no statutes authorizing proceedings by injunction. The plaintiff in error was not entitled to the relief demand, and the trial court committed no error in refusing the temporary injunction.

The order of the district court is affirmed, at the cost of the plaintiff in error.

Burwell, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Bank of Indian Territory v. Jas. R. Eckles.

BANK OF INDIAN TERRITORY, *a Corporation*, v. JAMES R. ECKLES,
as County Treasurer of Comanche County, Oklahoma Territory.

(Filed September 5, 1907.)

(91 Pac. 695.)

COUNTIES—Powers—Incurring Debts—Kiowa-Comanche Country. By the provisions of the act of congress approved March 3, 1901, (31 Stat. 1093) the board of county commissioners of Comanche county, Oklahoma, had no power or authority to allow any claim against the county revenues and issue a warrant prior to December 15, 1903, unless the contracting or incurring of such indebtedness was first authorized by the secretary of the interior.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

Stevens & Meyers, for plaintiff in error.

S. M. Cunningham, for defendant in error.

Opinion of the court by

BURFORD, C. J.: The Kiowa, Comanche, and Apache Indian country was opened to settlement on August 6, 1901, and Comanche county is composed of territory which originally was a portion of said Indian reservation. The county government was organized immediately after the opening of said reservation to white settlement, and W. W. Painter was by the governor appointed and qualified as sheriff of said county, and proceeded to discharge the duties of said office until his successor was elected and qualified in January, 1903. This proceeding is for a peremptory writ of mandamus to compel the treasurer of said county to pay four several warrants issued by the board of county commissioners to Painter, and by him assigned to the plaintiff. The petition for an alternative writ avers that on January 5, 1903, the board of county commissioners of Comanche county, Oklahoma, issued to

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W. W. Painter warrant No. 64 for \$10.40, warrant No. 65 for \$1.15, warrant No. 46 for \$985.80, and warrant No. 47 for \$1,687.90; that there was at the time ample funds in each of the funds upon which said warrants were issued to pay all indebtedness against said funds, including these warrants; that the county treasurer refused to pay them; that the Bank of Indian Territory was the owner of each of said warrants by assignment from Painter for a valuable consideration; and it was asked that an alternative writ issue, directing the treasurer to pay said warrants from the funds in his hands or show cause why he refused. The county treasurer, by way of return to the alternative writ, admitted all the averments contained in the petition, but alleged that each of said warrants was issued by the board of county commissioners without authority of law and in payment of claims for which Comanche county was not liable; that all of said warrants were for indebtedness incurred prior to the time for collecting county taxes in the calendar year next succeeding the opening, and that the incurring of said indebtedness had never been authorized by the secretary of the interior; that warrant No. 65, for \$1.15, was issued to Painter for repairs on the county jail, furnished on October 24, 1902; that warrant No. 64, for \$10.40, was issued for stamps bought and paid for by Painter as sheriff, between October 3, 1902, and October 31, 1902; that warrant No. 46, for \$985.80, was issued to Painter for criminal work done by him as sheriff of said county from January 1, 1902, to March 31, 1902; that warrant No. 47, for \$1,687.90, was issued to Painter for criminal work done by him as sheriff of said county during the quarter ending June 30, 1902; that said funds in the hands of the county treasurer were not liable for any of said indebtedness, but that the said indebtedness was payable, if at all, out of the funds derived from the sale of lots in the town of Lawton, which fund was in the hands of the secretary of the interior, and had never been in the hands of the county treasurer or subject to the order of the board of county commissioners; that there

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was at that time in the hands of the secretary of the interior a sufficient balance of said town lots sale fund to pay all charges against the same, and to more than pay plaintiff's claims. To this return to the alternative writ the plaintiff filed a general denial. The alternative writ and the return constitute the pleadings in the case, and the reply should be treated as a demurrer to the return. The facts are admitted in the argument to be as alleged in the writ and return, and the court so found.

The facts presented call for the application and interpretation of the act of congress of March 3, 1901, 31 Stat. 1093, 1094, c. 846. This act provides for the reservation of lands in each county for a county seat, the manner of disposal of the town lots, and the disposition to be made of the funds arising from such sale. It may be stated generally that the power of congress to dispose of the public lands, as well as to legislate directly for the territories, is unquestioned. In any case, when congress legislates upon any subject over which it has jurisdiction, its laws supersede all laws upon the same subject and serving the same purposes enacted by any of its subordinate dependencies. The territory of Oklahoma possessed the legislative power to create county offices, to fix their compensation, and provide the manner of their payment. Congress possessed the same powers. Yet there could be no conflict of authority or of law. The superior includes the inferior. Its laws are paramount, and when the superior legislates and makes specific provision for the payment of county officers and provides the fund from which they are to be paid, the laws of the territory upon the same subject are suspended and inoperative, and the laws of congress must prevail. The portion of the act in question is as follows: "The receipts from the sale of these lots in the respective county seats shall, after deducting the expenses incident to the surveying, subdividing, platting and selling of the same, be disposed of under the direction of the secretary of the interior in the following manner: A court-house shall be erected therewith at such county seat at cost of not exceeding ten

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thousand dollars, and the residue shall be applied to the construction of bridges, roads and such other public improvements as the secretary of the interior shall deem appropriate, *including the payment of all expenses actually necessary to the maintenance of the county government until the time for collecting county taxes in the calendar year next succeeding the time of the opening. No indebtedness of any character shall be contracted or incurred by any of said counties prior to the time for collecting county taxes in the calendar year next succeeding the opening, excepting where the same shall have been authorized by the secretary of the interior.*" ...In the interpretation of statutes, courts must find the meaning and intent in the language of the act itself, where there is no repugnancy or uncertainty. This statute seems clear. Congress knew what it wanted to accomplish, and said so; and we have no right to read into it some other purpose or meaning. Congress recognized the fact that under the laws of Oklahoma, which were then operative in these Indian reservations, county governments would be put in operation as soon as the country was opened to settlement, and by section 2 of the act it was provided: "The governor of the territory shall appoint and commission for each county all county and township officers made necessary by the laws of the territory of Oklahoma, who shall hold their respective offices until the officers elected by the people at the general election next following the opening shall have qualified." Congress knew that these officers so appointed would have to be paid, and the funds for the maintenance of a county government would have to be provided. By the laws of Oklahoma no taxes would be available for the payment of current expenses until December of the next year following the opening. The country was opened in August after the time for the assessment of property for that year had elapsed. The first assessment that could be made under our laws would be in the spring of the following year, and the first installment of taxes from this assessment would be payable December 15, 1902, and until this date congress made provision for maintaining

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county governments, and provided the funds and manner of their disbursement. In addition to providing a fund for the payment of all the necessary expenses incident to the maintenance and support of the county government during a given period, a prohibition was also imposed upon the counties. It was provided: "No indebtedness of any character shall be contracted or incurred by any of said counties prior to the time for collecting county taxes in the calendar year next succeeding the opening, excepting where the same shall have been authorized by the secretary of the interior." This was a wise and commendable act.

It has been suggested in the argument that this inhibition relates only to contractual obligations and does not affect imposed obligations or liabilities; that the salary of the sheriff was fixed by the laws of Oklahoma, and the law required him to be paid certain fees by the county, and that it was not the intention of congress to take from the counties the authority to pay this class of obligations. The language used by congress will not admit of this contention. The law says "contracted or incurred." The word "contracted" includes all of one class, and the word "incurred", to be given any meaning whatever, must be held to include another class. There are only two classes of county obligations, contractual and imposed, and evidently congress meant to include both classes. The word "incurred" is defined by Webster as "to become liable or subject to; to render liable or subject to." Black says: "Men contract debts; they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. 'Incur' means something beyond contracts, something not embraced in the word 'debt'". In *Scott v. Tyler*, 14 Barb. (N. Y.) 202, "incur" is held to mean "to become liable for." In *Flanagan v. Baltimore & Ohio R. Co.* (Iowa) 50 N. W. 60: "To become liable for." In *Beckman v. Van Dolsen*, 24 N. Y. Supp. 414: "To become liable for." In *Deyo v. Stewart*, 4 Denio (N. Y.) 101: "Brought on himself." In *Ashe v. Young*, 68 Tex. 123, 3 S. W. 454: "Brought on, occasioned, or

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caused." Hence it is apparent that the word "incurred" means more and embraces a different class of liabilities or obligations from those contracted. It means the indebtedness imposed upon the county by salaries of county officers and other required and necessary expenses, all of which, to be a charge against the lot sale fund, must be authorized or approved by the secretary of the interior. To use a phrase somewhat familiar in these days, congress imposed "departmental government" upon these new counties until such time as the revenues from the taxes levied upon thier own property were available for their expenses; and until that time no indebtedness could be created by the county officers or imposed by the laws of Oklahoma until such time as the prohibition in the act of congress expired by limitation, when the laws of Oklahoma became operative, and the "embryo quarantine" was raised.

The services for which Painter filed his claim should have been presented to the secretary of the interior, and his authority obtained to incur the liability against the funds in his hands, and payment enforced against the special fund set apart for this special purpose. It was a part of the expense of maintaining the county government which is charged with the enforcement of the criminal laws and the prosecution of criminals. The return set up a complete defense to the allegations of the writ, and, being found true, the peremptory writ was properly refused.

The judgment of the district court is affirmed, at the costs of the plaintiff in error.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Geo. C. Eldridge v. W. S. Robertson *et al.*

GEORGE C. ELDRIDGE v. W. S. ROBERTSON, A. D. ADAMS, *et al.*

(Filed September 5, 1907.)

(92 Pac. 156.)

1. **TAXATION—Tax Deeds—Necessary Recitals.** A tax deed which does not show upon its face the amount for which the tract or parcel of land which it purports to convey was sold is for that reason void.
2. **SAME—Number of Lots Included in One Deed.** While a number of lots sold for taxes to the same individual may be included in one tax deed, the deed must, on its face, show affirmatively that the different lots were sold separately, and also the amount for which each lot was sold.

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Reversed and remanded.

Devereux & Hildreth, for plaintiff in error.

Cotteral & Hornor, Houston & Buckner and Buckner & Buckner, for defendants in error.

Opinion of the court by

BURWELL, J.: Lots numbered sixteen, seventeen and eighteen, in block numbered twenty-six, in the city of Guthrie (proper), were, by the townsite board, deeded to George C. Eldridge. These lots were sold on execution issued out of the probate court of Logan county and purchased at the execution sale by one W. S. Robertson. Subsequently, lots seventeen and eighteen, in block twenty-six, referred to above, were sold for taxes, and a tax deed issued therefor to one N. F. Frazier, who conveyed the same by quitclaim deed to one A. D. Adams. The Denver, Enid & Gulf Railroad Company condemned all three of these lots and paid the condemnation money into court. Eldridge and Robertson claimed all of the condemnation money, and Adams claims the condemnation money for lots seventeen and eighteen through

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the tax deed therefor made to Frazier, her grantor. The trial court first tried the issue between Eldridge and Robertson and found in favor of Robertson, and then tried the issues between Adams and the other parties as to lots seventeen and eighteen, and found in favor of Adams; and, as the lots were of equal value, two-thirds of the condemnation money was ordered paid to Adams, and one-third to Robertson. Appeals were prosecuted to this court, and on September 6, 1906, this court, in the case of *Eldridge v. Robertson* (not officially reported) 87 Pac. 659, reversed the judgment of the trial court in so far as it decreed the rights of Robertson to be paramount to those of Eldridge. The court held therein that the probate court had no power to decree the sale of real estate on execution. This appeal involves the rights of Adams to the proceeds of lots seventeen and eighteen, the contest in relation thereto being between her and Eldridge. As stated before, Mrs. Adams claims under a tax deed executed by the county treasurer to N. F. Frazier. If this deed is valid, then she is entitled to the condemnation money for lots seventeen and eighteen; otherwise the proceeds should go to Eldridge, the original owner of the lots.

The tax deed to Frazier, under which Mrs. Adams claims, so far as necessary to consider, is in the following language:

"Whereas, N. F. Frazier, did on the 11th day of Oct A. D. 1904, produce to the undersigned, Joseph Stiles, treasurer of the county treasurer's office in said county, the tract, parcel or lot of purchase in writing bearing date of the 4th day of October, 1892, signed by L. F. Laverty, who at the last mentioned date was treasurer of said county, from which it appears that N. F. Frazier did, on the 4th day of October, 1892, purchase at public auction, at the county treasurer's office in said county, the tract, parcel or lot of land lastly in this indenture described, and which lots were sold to N. F. Frazier for the sum of one hundred eighty-four and 88-100 dollars, being the amount due on the following lots of land, returned delinquent for non-payment of taxes, and costs charged for the year 1891, to-wit: Lot 5 block 1, lot 6 block 1, lot 19 block 9, lot 5 block 10, lot 6 block 10, lot 21 block 10, lot 22 block 10, lot 8 block 11, lot 4 block 13, lot 6 block 13, lot 24 block 15, lot 3 block

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16, lot 4 block 17, lot 21 block 19, lot 5 block 21, lot 7 block 22, lot 8 block 22, lot 16 block 24, lot 17 block 24, lot 18 block 24, lot 18 block 25, lot 17 block 26, lot 18 block 26, lot 3 block 32, lot 11 block 35, lot 10 block 45, lot 3 block 55, lot 5 block 65, lot 6 block 65, lot 4 block 68, lot 20 block 68, lot 21 block 70, lot 1 block 74, lot 4 block 74, lot 18 block 87, lot 19 block 87, lot 20 block 87, all in Guthrie proper.”

This deed was duly recorded in the office of the register of deeds on November 20, 1894. Is it void upon its face? This court had occasion to consider a deed which was exactly in the form of the one in this case, in an opinion prepared by Mr. Justice Gillette, in the case of *Lowenstein v. Sexton*, 18 Okla. 322, 90 Pac. 410. The court, after setting out a copy of the deed in so far as necessary to determine the point involved, used the following language:

“The deed conveyed six separate parcels of land which were not contiguous, and recited that they were sold to plaintiff, Lowenstein, for the sum of \$133.78, on the 3rd day of September, 1894, at the office of the county treasurer. The lot in question was sold for \$43.63, which fact is not recited in the deed, but is shown by evidence produced upon the trial. It is urged that it was not necessary to the validity of the deed to this lot that the amount for which it was sold should have been recited therein. The statute governing the execution of tax deeds (section 5657, St. 1893) provides that the tax deed shall be substantially in the form which is set forth in that section, and which provides that the sum for which the property was sold should be set forth. It was not substantially in that form if it failed to set out the amount for which the property was sold. The tax deed under consideration does not do this, but does set out the total sum for which the six several tracts described in the deed were sold. The language of the statute is mandatory in its terms and tenor, and has not been complied with in this respect, so far as the lot in question is concerned as shown by the face of the deed. This court in *Weeks v. Murkle*, 6 Okla. 714, 52 Pac. 929, uses the following language: ‘We find that the tax deed upon its face, by its terms, purports to convey property not contiguous, which was jointly sold for taxes. Such fact, so found, is sufficient to invalidate the deed.’”

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The deed in the case now under consideration shows that a large number of lots, including lots seventeen and eighteen in block twenty-six, were sold to N. F. Frazier for the sum of one hundred eighty-four and 88-100 dollars. There is nothing in the deed that shows the sum for which either of these lots were sold. Under the decisions of this court this was necessary. Lots in a city must be listed and assessed separately. *Frazier v. Prince*, 8 Okla. 253, 58 Pac. 751. And while a number of lots sold for taxes to the same individual may be included in one deed, the deed must on its face show affirmatively that the different lots were sold separately, and also the amount for which each lot was sold. The deed in the case before us states that the "lots (describing all of the lots included in the deed) were sold to N. F. Frazier for the sum of one hundred eighty-four and 88-100 dollars, being the amount due on the following lots of land, to-wit:." This language indicates a sale of all of the lots together at one time. Therefore the deed is void, and neither Frazier nor his grantee, Adams, could claim the proceeds of the lot under it, as against the real owner, Eldridge.

In the case of *Lowenstein v. Sexton*, *supra*, the record showed a separate sale of the lots, but because the deed failed to recite the amount for which the particular lot sold, it was held to be void.

Upon this authority, the judgment of the lower court in the case now under consideration is hereby reversed, and the cause remanded with direction to proceed in conformity with this opinion. Costs taxed to Adams.

Burford, C. J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

H. J. Vandenberg v. P. T. Walton Lumber Co.

H. J. VANDENBERG v. P. T. WALTON LUMBER COMPANY *et al.*

(Filed September 5, 1907.)

(92 Pac. 149.)

1. **ERROR, WRIT OF—Review—Questions of Fact—Sufficiency of Evidence.** A case will not be reversed for insufficiency of evidence where the evidence is such as to reasonably support the judgment.
2. **MECHANICS' LIENS—Right to Lien—Subcontractor of a Subcontractor Not Entitled to.** A subcontractor of a subcontractor is not entitled to a lien on a building under the provisions of the statutes of Oklahoma of 1893 regarding "liens of mechanics and others." The right to a lien under such statutes is confined to artisans, laborers, contractors and subcontractors.
3. **SAME—Claims Against Subcontractor—Rights and Duties.** When a contractor for the erection of a building lets a subcontract to a portion thereof, and the subcontractor permits liens to be filed against the building, the contractor is not required under the law to defend against the respective amounts of such liens. It is the duty of the subcontractor and those claiming liens under him to defend against the allowance by the court of excessive or unjust claims. The contractor, under such circumstances, may refuse to pay any lien claimant the amount of his lien until after he establishes the correctness thereof in court, and before a proper court adjudicates the correctness of the same the contractor would pay it at his peril.
4. **SAME.** An original contractor is entitled to have all of the terms and conditions of a contract with a subcontractor fulfilled for the amount stated therein; and, when liens are filed against the building involved, it is the duty of the original contractor to advise the court by proper pleadings and proof as to the terms and conditions of the contract, the amount of money advanced thereunder, and of the balance due or to become due, together with such other information as will enable the court to properly dispose of the liens. If he does this, and then pays out such sums as the court may direct to the persons named by the court after the liens have been established, and the amount due from the subcontractor to the lien claimant has been duly decreed by the judgment of the court, he will be subject to no further liability in relation to such liens.
5. **SAME.** It is the duty of a person claiming a lien under a subcontractor for labor performed on a building to first establish

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by a judgment of court the amount due from the subcontractor to him, and to secure a decree establishing the lien before the original contractor is under any moral or legal obligations to pay the lien claimant the same; and, even then, due regard must be had for the amount of the contract under which the labor has been performed, and also as to whether or not the terms and conditions of the contract have been fulfilled, as it is not the intention of the law to require the one letting such a contract whether he be the owner or original contractor, to pay more than the contract calls for in compensation for the services to be rendered.

(Syllabus by the Court.)

Error from the Probate Court of Logan County; before J. C. Strang, Trial Judge.

Affirmed.

F. H. McGuire and L. O. Lytle, for plaintiff in error.
Dale & Bierer, for defendant in error.

Opinion of the court by

BURWELL, J.: H. J. Vandenberg was the principal contractor for the building of the Carnegie Library building in the city of Guthrie. He let the contract for the plastering to one H. R. Allen for the agreed price of \$940. C. L. Wright did some work on the building, and it was alleged that they were partners. The evidence of Wright himself was that he was connected with Allen in the plastering of the building. The P. T. Walton Lumber Company furnished material to Allen & Wright, which was used by them in the fulfillment of their contract and which actually went into the building. The lumber company commenced a suit in the probate court against Allen & Wright for the sum of \$161.30, for balance due on material furnished, and garnished H. J. Vandenberg for an alleged balance due from him to them. Vandenberg filed his answer denying any indebtedness to them or either of them. The lumber company filed a notice under the statute that it would take issue on the garnishee's answer. On the trial of the main case the lumber company recovered judgment against Allen & Wright for the amount claimed, and on the trial of the issue between it and

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the garnishee the court found in favor of the plaintiff and against the garnishee, Vandenberg. .

It is claimed that the evidence is not sufficient to support a finding that there was any sum due from Vandenberg to Allen & Wright under the plastering contract. We have read the entire record and, while the evidence is not so plain and direct as it might have been, or as plain as counsel could have made it, still we believe that it will support the judgment. That such indebtedness existed is reasonably deducible from the evidence.

The appellant also contends that he had to pay out money in defending liens filed against the building by reason of Allen & Wright not paying their obligations for materials and labor furnished them, but the trial court excluded the evidence offered in support thereof. Was this action of the trial court error? Allen or Allen & Wright were themselves subcontractors. And if the P. T. Walton Lumber Company, or other persons under contract with them, furnished material which they used in the plastering of the library building, they could not obtain a lien for the same on the building, as the lien law does not include in its provisions a subcontractor of a subcontractor. The mechanic's lien law of Kansas is identical with our own and the supreme court of that state has announced the same rule in the case of *Nixon v. Cydon Lodge No. 5 K. of P. Salina* (Kan.) 43 Pac. 236. The statute, however, does authorize artisans and day laborers who perform service under a subcontractor to obtain liens.

Regarding the expenditure of money by Vandenberg in defending against liens filed on the building, we perceive no reversible error in the ruling of the trial court. Vandenberg had let the plastering contract for a stipulated price, and it was his duty to pay out the money due under that contract in a manner that would protect the building from liens of laborers performing services at the request of Allen & Wright, and he was under no obligations to defend against any of such claims. Vandenberg had a lawful right to insist upon the lien claimants establishing their claims under

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their respective liens in court, and, if he had paid the liens before a court, by a proper judgment, found the amount due thereon, and adjudged the lien on the building, unless authorized to pay the claimants by Allen & Wright, he would have made such payments at his peril. When the liens were all established in court, then Vandenberg's duty would have been to pay out the amount due under the contract, under the order of the court, *pro rata*, to those entitled thereto. It was his duty, if liens were filed, to show to the court by the proper pleading and proof the amount which the subcontractors or those entitled to liens for labor under them, were entitled to receive, and he was not compelled to defend against those liens. His duty was to see that those who established liens against the building received the *pro rata* share of the amount for which he was liable to them; and he could not in law be expected to pay them until they were established. While the lien law was enacted for the benefit of contractors and laborers, it was not intended to compel the owner of the building, or superior contractors, to do more than their respective contracts call for, and, when a contract is let for certain portions of a building, the one letting it is entitled to have the contract fulfilled; that is, the material furnished and the labor performed, as agreed. If unjust liens are filed and even adjudged by the court to be correct, the one letting the contract is not responsible for that. It is the duty of the contractor and those claiming liens under him to protect themselves against such unlawful claims. The filing of the lien simply gives notice of the claim, and as it is not primarily a debt due from the owner of the building, or an original contractor, as the case may be, the claimant must recover judgment decreeing the amount due him, after which he may receive his share of the amount due under the contract under which he was employed or furnished material. What has been said in this opinion is not intended to indicate that the original contractor is not bound to protect the building from liens, but the building is in such circumstances liable only to the amount of the contract.

The judgment of the lower court is affirmed, at the costs of appellant.

Irwin, J., absent; all the other Justices concurring.

Board of County Commissioners of Garfield Co. v. Chas. V. Porter *et al.*

BOARD OF COUNTY COMMISSIONERS OF GARFIELD COUNTY V.
CHARLES V. PORTER *et al.*

(Filed September 5, 1907.)

(92 Pac. 152.)

WRIT OF ERROR—Case-Made—Time of Service. A party desiring to appeal has three days by statute in which to serve a case after a judgment or order is entered, and unless such case is served within that time, or within an extension of time allowed by the court or judge within such time, the case will not be considered in this court.

(Syllabus by the Court.)

Error from the District Court of Garfield County; before James K. Beauchamp, Trial Judge.

Dismissed.

Daniel Huett, County Attorney, for plaintiff in error.

R. L. Denton, for defendant in error.

Opinion of the court by

BURFORD, C. J.: The defendant in error, Porter, served two terms as sheriff of Garfield county. The other defendants in error were sureties on his official bond. The board of county commissioners allowed and paid him for transporting prisoners to the penitentiary, and for transporting insane persons. This is an action to recover the moneys so illegally allowed and paid. The defendants in error pleaded the settlements with the county board as an estoppel. The district court heard the case upon an agreed statement of facts and gave judgment for the defendants in error, upon the grounds that the settlements with the county board were conclusive unless set aside for fraud. The county now appeals.

The questions involved are of great public import and ought to be determined. But we are met with the objection that there is no sufficient record in this court upon which it can entertain jurisdiction. The case is here upon what purports to be a case-

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made, but it is insisted by the defendants in error that it was never properly served. The statute provides (Wilson's Rev. & Ann. St. 1903 §4741): "The case so made or a copy thereof shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing and present the same to the party making the case or his attorney. * * * "

Section 4742: "The court or judge may, upon good cause shown, extend the time for making a case and the time in which the case may be served." It follows from these provisions that the party desiring to have a judgment or order reviewed by the supreme court must prepare and serve his case upon the opposite party within three days after the judgment or order is entered, unless the court for good cause has extended the time, and an extension of time must be granted within the original time fixed by law or as extended by the court or judge. The court has no power to grant an extension of time to serve a case after the expiration of the time allowed by statute, unless within that time an extension has been given which has not expired. A case served after the time for serving same has elapsed is of no validity. *Abel v. Blair*, 3 Okla. 399, 41 Pac. 342; *Polson v. Pursell et al.*, 4 Okla. 93, 46 Pac. 578; *Horner v. Christy*, 4 Okla. 553, 46 Pac. 561; *Segman v. Poole*, 5 Okla. 677, 49 Pac. 944. The judgment was entered on April 28, 1906, and no extension was given for the making and serving of a case. On the same day a motion for new trial was filed, which was overruled on May 8, 1906. At this time plaintiff in error requested an extension of time in which to serve a case, but there is no order in the record granting this request or extending the time. The case was submitted upon the pleadings and an agreed statement of facts. There was no necessity for a motion for new trial. The case went to the court upon a question of law, the facts being settled by stipulation, and the overruling of the motion for new trial saved no question for review, and, even had an extension been given at the time the motion for new trial was overruled, it would be unavailing in this character of a case. *Doorley v. Buford & George Co.*, 5

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Okla 594, 49 Pac. 936; *Horn v. Newton State Bank*, 32 Kan. 523. 4 Pac. 1022; *Richie et al. v. K. N. & D Ry.*, 55 Kan. 36, 39 Pac. 718; *Schmetzler v. Green et al.*, 5 Kan. App. 656, 47 Pac. 996; *Nollie v. Harter*, 6 Kan. App. 823, 49 Pac. 794. In this last case it is said: "Where a case is submitted to the trial court upon an agreed statement of facts, a motion for a new trial is unnecessary and the court does not err in overruling such motion. When the parties to an action agree to admit all the facts upon which they desire to have the case submitted to the court, they have agreed upon what the facts in the case are; and, when such facts are communicated to the court for the purpose of having it draw conclusions of law thereon, they become an agreed statement of facts." The case-made attached to the petition in error is no part of the record; it was not served within proper time, and cannot be considered. The case could have been brought up on a transcript. The pleadings, the agreed statement of facts, and the judgment are all parts of the record, but there is no proper certificate of the clerk authenticating the copies incorporated into the case.

The appeal is dismissed, at the costs of plaintiff in error.

Irwin, J., absent; all the other Justices concurring.

J. E. PRINCE v. R. L. GOSNELL.

(Filed September 5, 1907.)

(92 Pac. 164.)

SPECIFIC PERFORMANCE—Contract—Validity—Alienation by Homesteader. A contract by a homesteader to alienate a portion of the tract while occupied by him as such, when he shall acquire title from the United States, is against public policy and void, and no action either at law or equity can be predicated thereon.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

R. J. Ray and J. A. Fain, for plaintiff in error.

Ahern & Hetzel and McElhoes & Ferris, for defendant in error.

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Opinion of the court by

GARBER, J.: J. E. Price, the appellant, was plaintiff in the court below, and the appellee, R. L. Gosnell, was defendant. The plaintiff filed his amended petition in the district court of Comanche county to which a demurrer was interposed by the defendant. From a judgment sustaining the demurrer and dismissing the action, plaintiff appeals. The election of plaintiff to stand upon his amended petition presents but one question in this court for consideration, viz: Does the amended petition state facts sufficient to constitute a cause of action? The petition substantially alleged that the plaintiff was the equitable owner of lot twenty-one (21), in block twenty-four (24), in the town of Frederick, in Comanche county, Oklahoma Territory; that on the 6th day of August, 1901, the Kiowa, Comanche, and Apache Reservation was opened to settlement; that during that year the defendant, Gosnell, Bismark Houssels, and certain other persons associated with them, and known as the Frederick Townsite Company, entered into an agreement and understanding with themselves and with the Bes Line Construction Company, a corporation, to acquire title to a tract of land in Comanche county, Oklahoma Territory, along the line of the Blackwell, Enid & Southwestern Railroad, which was then being constructed through said county, and to open up said tract for townsite purposes for their joint use and benefit, and to share in a division of the lots and the proceeds arising from the same. It was agreed that the town of Frederick should be located on said tract of land, and, as a consideration to Gosnell, Houssels and the Bes Line Townsite Company agreed to cause a depot to be located on said tract and the town to be made a station on said line of road. In pursuance of said agreement and understanding, it was alleged: That the said R. L. Gosnell did acquire title to the northwest quarter of section sixteen (16), in township two (2) south, of range seventeen (17) west of the Indian Meridian, in said Comanche county, Oklahoma Territory, and had the same surveyed and platted into a townsite known as the town of Frederick, for the common use and benefit of all the parties actively

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engaged in promoting said town; that about the time said town of Frederick was opened up, as aforesaid, the town of Hazel was laid out and opened up about one-half mile south of said town of Frederick on the line of said railroad, and both towns became occupied by many trades and businesses, and a strong rivalry existed between them for supremacy, the occupants and property owners in both places well knowing that both towns could not prosper in such close proximity, and that the abandonment of the one meant the survival and prosperity of the other; that on the 4th day of April, 1902, and for a long time prior thereto, plaintiff owned several business lots in said town of Hazel, on one of which he had a storehouse and was carrying on a mercantile business therein, and was using his means and influence in promoting the town of Hazel; that on said day, for the purpose of inducing the plaintiff to move his storehouse and business from Hazel to Frederick, to and upon the lot in said town of Frederick to be selected by him under a contract hereinafter set forth, and in consideration, in substance, that he would do so, the said Bismark Houssels, for and as manager of the said Frederick Townsite Company, and for their joint common use and benefit, agreed in writing with plaintiff, as follows:

“Gosnell, O. T., 4-4-1902.

“I hereby agree to give Tom Goddard and J. E. Prince one lot each, to be selected by them out of the Frederick Townsite Company property, reserving only such lots as have houses on them, and the corner lot by the side of McCurdy's grocery store.

“[Signed] B. HOUSSELS, for Frederick Townsite Company.”

That for the purpose of carrying out the agreement between Gosnell, Houssels, the Bes Line Townsite Company, and the Frederick Townsite Company, the said R. S. Gosnell, Bismark Houssels, and their said associates did induce the plaintiff herein, among others similarly situated, to abandon said townsite of Hazel in order that it might be shown that there was no townsite near the proposed townsite of Frederick, and that it was necessary to establish a townsite upon the said tract of land as shown by the application of Robert Gosnell to commute said tract

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for townsite purposes, and for the purpose of securing a patent to said land under the act of congress of May 11, 1902, extending the provisions of the act of May 2, 1890, to and making it applicable to said lands, and for the purpose of avoiding the formal resubmission of townsite proof in support of his said application, and to secure patent upon the original proof submitted, the said R. L. Gosnell showed to the secretary of the interior that the tract was at the time actually occupied for townsite purposes; and that those persons who had formerly occupied the townsite of Hazel, including this plaintiff, had abandoned said townsite of Hazel, and were actually at the time occupying lots in the said proposed townsite of Frederick and engaged in trade and business thereon; and because of such showing the honorable secretary of the interior caused a patent to be issued for said tract to the defendant, R. L. Gosnell, for townsite purposes; and that by reason of the issuance of said patent to said defendant for townsite purposes and under the proof, as aforesaid, a constructive trust was created in favor of the occupants of the lots of said townsite of the lots which they were at that time occupying for the purpose of trade and business, and especially this plaintiff, who, under the terms of the contract with the defendant, had entered upon and selected lot twenty-one (21), in block twenty-four (24), in said town of Frederick, which was one of the lots opened for selection by plaintiff under said written agreement, and had moved his store house thereon, and was occupying the same, and by reason of the facts set forth, of the issuance of a patent to said tract of land to said Gosnell for townsite purposes, as aforesaid, a constructive trust was created in the said R. L. Gosnell for the use and benefit of the plaintiff of said lot twenty-one (21), in block twenty-four (24), in the town of Frederick. Plaintiff further alleged that while the legal title to the town of Frederick was taken and vested in the defendant, R. L. Gosnell, it was partnership property held by him for the common use and benefit of himself, the Bes Line Townsite Company, Bismark Houssels, and certain other persons associated with them, known as the

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Frederick Townsite Company. and that the legal title to said lot twenty-one (21), in block twenty-four (24), still remains in the said R. L. Gosnell, and that he fails and refuses to convey the same to this plaintiff. Wherefore plaintiff prayed for the title to said lot, and that the title to the same held by the defendant be decreed a trust for the use and benefit of the plaintiff, and that conveyance by a good and sufficient title and deed be decreed to him.

An examination of the petition discloses that the Kiowa, Comanche and Apache Reservation, of which the tract of land in controversy is a part, was opened to settlement on the 6th day of August, 1901, and, during that year, the defendant, R. L. Gosnell, Bismark Houssels, and certain other persons associated with them, known as the Frederick Townsite Company, entered into an agreement and understanding with themselves and with the Bes Line Townsite Company to acquire title to a tract of land in Comanche county, Oklahoma Territory, along the line of the Blackwell, Enid & Southwestern Railroad, which was then being constructed through said county, that said tract of land should be platted for townsite purposes for the joint use and benefit of all the parties. The exact date when the defendant made his homestead entry upon the tract in question does not appear. If alleged to have been made subsequent to the agreement with Housels and the Townsite Company to open up the same for townsite purposes for their joint use and benefit, it would be fatal to the petition. The theory of the homestead law is that the homestead shall be for the exclusive use and benefit of the homesteader. Section 2290, Revised Statutes U. S., provides: "That a person applying for an entry of a homestead claim shall make affidavit," and, among other things, "such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use and benefit of any other person"; and section 2291 prescribes the time and manner of final proof and requires that the applicant make "affi-

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davit that no part of such land has been alienated except as provided in section 2288," which section provides for alienation for "church, cemetery or school purposes, or for the right-of-way of railroads." The law contemplates five years of continuous occupation by the homesteader, with no alienation except for the above-named purposes. Giving the plaintiff the benefit of the presumption that Gosnell was acting in good faith and was disposed to and did comply with the condition precedent to filing his homestead entry upon the land, and that the facts set forth in his affidavit were true, viz., that his application was made for his exclusive use and benefit and for the purposes of actual settlement and cultivation, and not directly for the use and benefit of any other person, there is no allegation that Gosnell made his application to prove up his homestead tract as a townsite prior to the alleged agreement between Houssels, the townsite company, and the Bes Line Construction Company, and the presumption would be that, having entered the land as a homestead, he was occupying it as such at the time of the agreement to dispose of it for townsite purposes. The question, then, arises: Could Gosnell, while occupying the land as a homestead, and prior to filing his application to prove up under the townsite act, showing a change of his intentions, enter into a valid contract to alienate the land or any portion of it? The authorities answer this question in the negative, such a contract being in violation of the homestead law and void.

In *Mellison et al. v. Allen*, 30 Kan. 382, 2 Pac. 97, it was held: "Where a party occupying lands of the United States with a view of acquiring title thereto, under the provisions of the homestead laws before the expiration of five years from the date of his entry and the ripening of his homestead right, sells an undivided interest therein, receives full payment and executes a contract to convey such interest by warranty deed after the perfecting of his title a court of equity will not lend its aid to compel the specific performance of the contract." In *Anderson v. Carkins*, 135 U. S. 483, citing, with approval, *Mellison v. Allen*, *supra*, it was held:

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"A contract by a homesteader to convey a portion of a tract when he shall acquire title from the United States is against public policy and it can not be enforced although a valuable consideration may have passed to the homesteader from the other party." In *Biddle v. Adams*, 5 Kan. App. 734, 46 Pac. 986, it was held: "A mortgage given upon a piece of land prior to the making of the final proof by a person occupying the same under the homestead laws of the United States is void." The supreme court of this territory, in *Bass v. Smith*, 12 Okla. 485, 71 Pac. 628, held that: "No action either at law or in equity can be maintained on a contract that is forbidden by law. The sound policy of the law is to leave the parties in all such cases without a remedy, since the courts will not lend their aid to a party who bases his action on a contract in violation of the organic law or the statute, or upon an act that is immoral or is in contravention of sound public policy." In the above case the action was for specific performance to compel the conveyance of a certain tract of land to the plaintiff, and was predicated upon an agreement whereby the plaintiff had agreed with one Smith to furnish money with which to improve a homestead, and as a consideration therefor Smith was to deed the land to the plaintiff. The money was furnished by the plaintiff according to agreement, and, Smith having died, his heirs refused to convey, whereupon the plaintiff brought suit for specific performance. In the opinion by Mr. Justice Hainer, it was said: "The sole question presented by the record is as to the validity of the contract entered into between the plaintiff, Sarah C. Bass, and the decedent, David W. Smith. Was the contract a valid one? Can such a contract be enforced?" These questions must all be answered in the negative, citing numerous authorities to the effect that no action either at law or in equity could be maintained on such a contract forbidden by law. In *Higgins et ux. v. Butler et ux.*, 10 Okla. 345, 62 Pac. 810, the cause of action was based upon a written agreement set out in the petition, in which it appeared that Robert Higgins, one of the plaintiffs in error, was the occupant of a certain tract of land, the title to

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which was then in the government of the United States, and that while in said occupancy the plaintiffs in error entered into a contract with the defendants in error whereby they were to furnish a sufficient amount of money to build a house upon said tract of land and to fence same in consideration of the conveyance to them of a one-fourth interest in the land when patent should issue therefor. In pursuance of the terms of the above contract, the petition alleged that the defendants in error paid to the plaintiffs in error a sufficient amount of money, to-wit, \$500.00, which was expended by the plaintiffs in error in building a house and fencing the land according to the terms of the agreement; that the patent was issued to one of the plaintiffs in error for said tract; but that the plaintiffs in error refused to convey to the defendant in error the said one-fourth interest, whereby the defendant in error became the equitable owner of an undivided one-fourth interest in said land and was entitled to a conveyance thereof from the plaintiffs in error. In reference to the validity of the contract as set out in the petition, Mr. Justice Irwin, speaking for the court, said: "The first defense relied upon by the defendants was that such a contract to convey land is illegal and void. When we consider that portion of the petition which asks for the specific performance of the contract, or that portion which asks to have the contract considered as a mortgage against the premises, and for a foreclosure of the same, in the light of the doctrine laid down by the supreme court of Kansas in the case of *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, the doctrine declared by the California supreme court in the case of *McGregor v. Donnelly*, 7 Pac. 422, we must concede that this contention is correct, and that such a contract is void."

The citation of additional authorities in support of such a well settled proposition of law will be unnecessary. The contract entered into while Gosnell was occupying the land as his homestead, whereby Houssels, the townsite company, and the Bes Line Construction Company were to receive an interest in said land when platted in consideration of locating a depot and station on

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said tract, was in violation of the homestead laws and void as against public policy. No legal or equitable right could result from such an agreement, and Gosnell's subsequent application to prove up under the townsite act did not make it valid. The agreement by Houssels for the townsite company to convey a lot to plaintiff was therefore void and of no binding force and effect upon the defendant, and the decree for specific performance could not be predicated thereon.

The judgment of the district court sustaining the demurrer to the petition will therefore be affirmed.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

MARY DOXY V. EXCHANGE BANK OF PERRY.

(Filed September 5, 1907.)

(92 Pac. 150.)

1. **BILLS AND NOTES—Consideration—Personal Benefit.** Where a benefit is conferred by a third party or a detriment suffered by the payee of a note at the instance of the maker thereof, it will be sufficient consideration to support the note, even though the maker thereof received no personal benefit by reason of the execution and delivery thereof.
2. **SAME—Estoppel—Case.** Where a joint and several promissory note is secured by a chattel mortgage, and a third party signs the note some time after the execution and delivery upon the consideration that the payee or holder will release or waive his mortgage security, which is done, when sued individually on the note, he is estopped from claiming that he signed the note without the knowledge of the original makers.

(Syllabus by the Court.)

Error from the District Court of Payne County; before Jno. H. Burford, Trial Judge.

Affirmed.

J. M. Springer, for plaintiff in error.

Bush & Bowers and *Doyle & Cress*, for defendant in error.

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Opinion of the court by

BURWELL, J.: On December 28, 1901, Miner Doxy and Conna Doxy executed and delivered to A. W. McCandless their joint and several promissory note for two hundred dollars, due six months after date. This note before April 4, 1902, was transferred and assigned to the Exchange Bank of Perry, Oklahoma. On January 11, 1902, Conna Doxy executed and delivered to the Exchange Bank of Perry his promissory note for fifty-four dollars and seventy-five cents, due six months after date. On February 1st, 1902, Miner Doxy executed and delivered to the Exchange Bank of Perry his promissory note for thirty-eight dollars and seventy-five cents. These notes were all secured by chattel mortgages. The mortgagors removed the property included in the chattel mortgages from the county in violation of law and without the consent of the mortgagee. On April 4, 1902, the appellant, Mary Doxy, signed each of these notes, as appellee claims, under an agreement that it would waive the mortgage security held by it. The finding of the jury sustains this contention, and the evidence reasonably supports this finding.

It is first contended by the appellant that this is a contract to answer for the debt of another, and that she could not be bound on the note unless she had signed it at the request of the makers, which she denies. We cannot agree with this view of the law. It was not necessary that some valuable consideration or benefit flow to Mrs. Mary Doxy for the signing of these notes to make them binding upon her. The releasing of the property covered by the chattel mortgages which had been executed to secure the payment of the notes, and the benefit that such release would be to her sons, and the surrendering of such security by the bank, was a sufficient consideration for her signature to the notes. In the case of *Wright v. McKilkrick* (Kan.) 43 Pac. 977, the court of appeals of Kansas, speaking through Mr. Justice Garver, said: "It is no defense to an action on a promissory note for the maker to say that there was no consideration which was beneficial to him personally; it is sufficient if the consideration was a benefit con-

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ferred upon a third person, or a detriment suffered by the promisee, at the instance of the promisor." See also Cyc. vol. 6, page 690, sec. 2.

Many other authorities might be cited upholding this principle, but it is unnecessary, as no one will deny but that the releasing of security for the same debt, the extending of time of payment, or loss to the payee of the note, or the waiving of a legal right by reason of the execution and delivery of the note, is a sufficient consideration. The real test is: Did the payee part with value or waive a legal right by reason of the execution and delivery of the note? If he did, it is a sufficient consideration to authorize a recovery for the amount due thereon. The fact that Mary Doxey signed the notes some time after their execution and delivery is immaterial. When she signed them they became her personal promises, and she will not be permitted to say that the original makers of the notes did not request her to do so, when the bank waived its security under the mortgage by reason of her signature to them. The notes are joint and several, and she is bound, regardless of whether or not the original makers consented to the arrangement between her and the bank. When she signed them they became her promises, and the waiving of the mortgage security was a sufficient consideration.

We have considered all of the questions raised by appellant; but are of the opinion that the judgment of the lower court should be affirmed. It is so ordered, and the costs are taxed to appellant.

Burford, C. J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Kerfoot, Miller, Arnold & Co. v. J. B. Jones.

KERFOOT, MILLER, ARNOLD & Co. *a Corporation*, v. J. B. JONES,
Receiver of Stock Exchange Bank of Hollis, Oklahoma Ter-
ritory.

(Filed September 5, 1907.)

(92 Pac. 141.)

WRIT OF ERROR—Record—Necessary Averments—Review. This court will not review any question dependent upon an examination of the evidence for its determination, where the record fails to disclose, by averment or its equivalent, that it contains all the evidence introduced on the trial.

(Syllabus by the Court.)

Error from the District Court of Greer County; before Clinton F. Irwin, Trial Judge.

Affirmed.

H. A. Smith, W. F. Wilson and H. E. Elder, for plaintiff in error.

B. F. Van Dyke, for defendant in error.

Opinion of the court by

BURFORD, C. J.: This cause was tried to the court upon an issue of fraud alleged by the plaintiff in error. Depositions were read, witnesses examined, and certain books, checks, and accounts introduced in evidence. The court decided against the plaintiff in error, and rendered judgment against it for costs. The company appealed, and the only questions submitted for our review depend upon an examination of the evidence for their determination.

It is apparent that the evidence is not all in the record. This court has repeatedly held, and must adhere to the rule, that where the case-made does not contain an averment by way of recital, or its equivalent, that it contains all the evidence introduced on the trial of the cause, this court will not review any question which requires an examination of the evidence in order to determine it.

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And this rule must be applied here. *Frame v. Ryel*, 14 Okla. 536 79 Pac. 97; *Board of Washita Co. v. Hubble*, 8 Okla. 169, 56 Pac. 1058; *Sawyer Lumber Co. v. Champlin Lumber Co.*, 16 Okla. 90, 84 Pac. 1093; *Kiowa Co. Bank v. Hobart Ice Co.* (Okla.) 89 Pac. 1118.

The judgment of the district court of Greer county is affirmed, at the costs of the plaintiff in error.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

CALVIN D. GULLEY V. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 1087.)

1. **PHYSICIANS AND SURGEONS—License—Revocation—Jurisdiction.** The district courts have exclusive jurisdiction to hear and determine the question whether a license to practice medicine was fraudulently obtained.
2. **SAME—Action—Territory as Party.** The territory is not only a necessary party, but it is the proper party to institute such an action.
3. **SAME—Grounds for Revocation—Fraud.** A license to practice medicine procured through the presentation of a pretended diploma from a fraudulent medical college, without an examination, will be revoked and canceled in a proper proceeding in the district court.
4. **SAME—Jury—Right to Trial by.** An action to cancel a license upon the ground that it was fraudulently obtained is an equitable proceeding, and the licensee is not entitled to a jury trial as a matter of right.

(Syllabus by the Court.)

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Affirmed.

Calvin D. Gulley, plaintiff in error, *in pro. per.*

Cotteral & Hornor, for plaintiff in error.

W. O. Cromwell, Attorney General, *Don C. Smith*, Assistant, and *P. C. Simons*, Associate Counsel, for defendant in error.

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STATEMENT OF THE CASE.

This was an action brought in the district court of Logan county by the territory of Oklahoma against Calvin D. Gulley, plaintiff in error, and defendant in the court below, to cancel a license to practice medicine issued on February 11, 1902, by the then superintendent of public health to the plaintiff in error, upon the ground that the license was procured by fraud and deception. The material averments in the petition are as follows:

That on the 8th day of February, 1902, the defendant, Calvin D. Gulley, being desirous of obtaining a license from the superintendent of public health, for the purpose of enabling him, under the provisions of law in force at that time, to engage in the practice of medicine and for the purpose of obtaining a license from the superintendent of public health, executed a certain application in writing, which was duly verified and which, among other things, stated as follows:

"I, Calvin D. Gulley, now of Guthrie, county of Logan, Oklahoma Territory, being first duly sworn, state on my oath that I graduated from the Independent and Metropolitan Medical College located in the city of Chicago, state of Illinois, in 1896, and that I am the identical Calvin D. Gulley to whom a diploma of graduation was issued by the aforesaid colleges of medicine on the fourth day of November, 1896, which diploma I now have in my possession."

That thereupon said application was duly presented to the superintendent of public health, and that the said superintendent of public health, acting upon and relying upon the statements and representations contained therein, issued and delivered to the applicant on the 11th day of February, 1902, a license to practice medicine and surgery in said territory, and registered the said applicant, as required by the laws then in force in said territory. That under the laws of the territory of Oklahoma in force and effect at the time of making and presenting said application and affidavit by the defendant, it was provided that no person should be permitted to practice medicine, in any of its departments, in this territory, unless he were a graduate of a medical college, or

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unless, upon examination before a board composed of the superintendent of public health and two other physicians to be selected by the territorial board of health, such person should be found proficient in the practice of medicine. And it was further provided that: "Any person possessing the qualifications mentioned in this section shall, upon presentation of his diploma, or proof thereof by affidavit, if the same is lost or destroyed, and upon the affidavit of two reputable citizens from the county where he resides that such applicant possesses the qualifications of a physician, as prescribed herein, to the superintendent of public health, together with a fee of two dollars, receive from such superintendent of public health, a license, certifying the applicant to be a practicing physician, and having the qualifications for such," etc.

The petition further alleges that there was no medical school in the city of Chicago, state of Illinois, on or about the 4th day of November, 1896, known as the "Independent and Metropolitan Medical College." That there was a pretended institution located in said city at that time known as and pretending to operate under the name of the "Independent Medical College," but that said institution was not, in fact, a medical college, and was not engaged in the business of conducting an institution of learning where personal attendance of students is required and where the study of medicine and surgery is taught by a faculty of instructors composed of qualified physicians and surgeons or teachers learned in the art of medicine and surgery. But, on the contrary, said institution was merely a "diploma mill," doing business under the cloak of its corporate name, and engaged in advertising and selling diplomas and conferring degrees as a means of profit, and as an assistance to individuals to enable them to engage in the practice of medicine, regardless of the question of their competency. That the said pretended medical college had no prescribed fixed time during which applicants for degrees or diplomas should pursue the study of medicine, or that required the students to take any fixed or certain course of study, or for any length of time, and that said institution was wholly con-

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ducted for pecuniary profit, and that it conferred degrees and issued diplomas for parties without regard to the qualification or fitness of the applicant to practice medicine. That diplomas and degrees could be purchased from said pretended medical college by any person who was willing to pay the price asked by the officials of said concern, and that learning and knowledge in the science of medicine and surgery was not made a prerequisite to the issuing of diplomas and conferring of degrees by the said pretended institution. That the said pretended medical college known as the "Independent Medical College of Chicago, Illinois," was organized and chartered on or about the twentieth day of October, 1896, and that the pretended diploma issued to the said defendant was dated, according to his statement, on November 4, 1896, being about two weeks after the incorporation of the said pretended medical college. That the defendant never attended said pretended medical college, and did not take any course of study at such institution, that none was required of him, and that he did not personally attend such college, and that said pretended college did not have any regular sessions, and that the statements made and contained in the application and affidavit of the defendant, to the effect that the Independent Medical College and the Independent and Metropolitan Medical Colleges were located in the city of Chicago, and were medical colleges, were false and untrue, and that the statement contained in said application and affidavit that he had attended the regular sessions of said college were false and untrue. That the said defendant made said statements knowing them to be false and untrue, and for the express purpose of deceiving the superintendent of the territorial board of health, and with the fraudulent intent and purpose of causing the territorial superintendent of health to rely upon and believe said statements, and in reliance thereupon, and believing the same, to issue to the said defendant a license to practice medicine and surgery in the territory of Oklahoma. That said statements were material and were the basis and foundation of the official action of the superintendent of the territorial board of

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health in issuing said license, and that the said superintendent of the territorial board of health did rely upon said statements and representations so made in said application and affidavit aforesaid, and in reliance thereupon, and believing the same, by reason of the representations of the defendant, did, pursuant thereto, issue him a license and permit, as provided by the laws of the territory of Oklahoma, to practice medicine and surgery therein. That upon the issuance of said license, the defendant proceeded to locate in said territory and to engage in the practice of medicine and surgery, and is now engaged in the practice of medicine and surgery, and holds himself out to the public as a physician and surgeon, and advertises himself as a medical doctor, and solicits business as a physician in the treatment of the sick and infirm, and represents that he is qualified and authorized to pursue said profession and business. That by reason of the premises above stated the said defendant practiced a fraud and deceit upon the superintendent of the territorial board of health, and upon the territory of Oklahoma, knowingly, intentionally, and purposely, for the purpose of procuring a license to enable him to practice medicine and surgery in Oklahoma, when in truth and in fact he was not entitled to such license, and could not have procured the same except for the false and fraudulent statements made by him in his application and affidavit. Wherefore the plaintiff prays that the license issued to the defendant on February 11, 1902, be revoked, canceled, annulled, and held for naught, etc.

To this petition the defendant interposed a demurrer, on the ground that the court had no jurisdiction of the subject-matter of the action, that several causes of action were improperly joined, and that the petition failed to state facts sufficient to constitute a cause of action. This demurrer was overruled and exception noted. Thereupon the defendant filed an answer, which admits that on the 8th day of February, 1902, he filed his application as required by the statutes of Oklahoma, and that a license was issued to him upon said application and affidavit, and without the taking of an examination; that he denies all other material alle-

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gations contained in said petition, and specifically denies that there was any fraud, deception, or misrepresentation in the procuring of said license.

The plaintiff replied to all the new matters set up in the answer, and upon the issues joined the cause was tried to the court, without a jury, and the court found the issues in favor of the plaintiff and against the defendant, and entered judgment revoking, cancelling, and annulling the license issued to the defendant on the 11th day of February, 1902, to which finding, ruling, and judgment of the court the defendant duly excepted, and brings the case here for review.

Opinion of the court by

HAINER, J.: It is contended by the plaintiff in error that the territory of Oklahoma is not the proper party to institute this action, and that the court had no jurisdiction of the subject-matter of the action. There is no merit to these contentions. The latter part of section 14 of chapter 8 of the Statutes of Oklahoma of 1893 (section 352) in force at that time, contains the following provision:

"The district court shall, upon the complaint of any member of the territorial board of health or the county board of health where he resides have power to cancel any license that may be issued to any person to practice medicine where such license was fraudulently obtained, or where the person to whom such license was issued has been guilty of violating any provisions of this act."

It will thus be seen that the statute clearly confers upon the district court the power to cancel a license issued to any person to practice medicine, where such license was fraudulently obtained. Hence the court clearly had jurisdiction of the subject-matter of the action.

But it is contended that the action should be instituted by the territorial board of health, or some member thereof. We do not think the statute is susceptible of such a construction. It provides that upon complaint of a member of the territorial board of health, the action may be instituted in the district court for the

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cancellation of the license. This does not mean that the action shall be instituted in the name of the territorial board of health, or any member thereof. The record discloses that the action was instituted upon the complaint of the territorial board of health, and upon the direction of the governor of the territory, and we think that this fully satisfies the requirements of the statute. Manifestly, the territory of Oklahoma is not only a necessary party, but it is the proper party to institute such an action.

It is also contended that the evidence is insufficient to sustain the finding and judgment of the court below. In our opinion the evidence fully sustains the allegations of fraud and deception in the procurement of the license, and we think that no other reasonable or just conclusion could have been reached by the trial court. The record discloses a flagrant case of fraud, deception, and misrepresentation in the procurement of the license. And this is not all. The applicant knew, at the time he made his application and verified the same, under oath, that he was not a graduate of a reputable medical college, within the meaning of this statute. He knew that the pretended diploma which he held from the college was a mere sham and fraud, well calculated to mislead and deceive the territorial board of health. He knew that the obtaining of the diploma was a mere pretence and fraud, and he knew that the supreme court of the state of Illinois had, long prior to his application for license to practice in this territory, forfeited the charter of this pretended medical college, and declared "that the corporation is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice."

In the case of *Independent Medical College v. People ex rel. Aikin, Attorney General*, 182 Ill. 274, 55 N. E. 345, the right of this medical college to transact business in the state of Illinois was directly involved. And this is the college from whence the plaintiff in error represented that he was a graduate. The action was "a proceeding by information in the nature of a *quo warranto*, brought in the circuit court of Cook county, February

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term, 1898, by the people, on the relation of the attorney general, against the Independent Medical College, a corporation, of Chicago, to forfeit its franchise or charter. The corporation was chartered in 1896, having as its object the establishment of 'an institution of learning,' and 'for the purpose of promoting mental and physical culture,' and for teaching branches taught in medical colleges generally, with power to grant diplomas and confer degrees. The information charged that the corporation was conducted for pecuniary profit; that it conferred degrees and issued diplomas for a price, without regard to the qualifications or fitness of the applicant to practice medicine. that in some cases no examination whatever was required, and degrees were conferred upon persons wholly unfit and incompetent; that in one case, specifically alleged, a diploma or license to practice medicine and surgery was granted for the price of \$25, the applicant never having been a student of medicine or surgery. It was further charged that the corporation was a diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice. The respondent filed a plea to the information, denying its general allegations, and averring that it had not resorted to wrongful or unlawful methods in conferring degrees as a means of profit to its incorporators, and that it has not issued diplomas to persons wholly incompetent to practice medicine. To this plea the attorney general filed a replication, averring that the defendant 'has usurped and misused, and does now usurp and misuse, its liberties, privileges, and franchises,' and tendering issue. Issue being joined, the cause was heard by the court, without a jury, upon the pleadings and evidence taken. The court found the defendant guilty as charged, and rendered judgment that the Independent Medical College be ousted and excluded from the exercise of all its corporate privileges and franchises under its articles of incorporation." From the judgment an appeal was prosecuted to the supreme court of the state of Illinois, and in affirming the judgment, the court said:

"Without an extended analysis or weighing of the testimony

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introduced upon the trial as it appears in this record, we have no hesitancy in saying that it fully justified the finding and judgment of the court below. In fact, it is sufficient to establish the guilt of the defendant, as charged in the information, beyond a reasonable doubt, and would have justified, not only the forfeiture of the charter, but the infliction of a fine upon the parties guilty of the abuses."

In *Illinois Health University v. People*, 166 Ill. 171, 46 N. E. 740, the supreme court of Illinois, in discussing this question, said:

"It is not consistent with the public policy of a state which enacts stringent laws for the preservation of the public health, and for the protection of its people from quacks and ignorant pretenders to a knowledge of the science of medicine and surgery, to authorize or permit a pretended health university to turn any one whether known or unknown, qualified or unqualified, into a doctor of medicine, armed with a diploma and degree as one qualified to heal the sick, who may answer its prescribed list of questions and pay its prescribed fee. The charter of a corporation is the full measure of its power, and, if any doubt arises out of the language employed in such charter, such doubt must be resolved in favor of the state. *Mills v. St. Clair Co.*, 2 Gilman (Ill.) 197; *St. Louis J. & C. R. Co. v. Trustees, etc., of the Institution for the Blind*, 43 Ill. 303; *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634; *St. Clair Co. Turnpike Co. v. People*, 82 Ill. 174; *Minturn v. Larue*, 23 How. (U. S.) 435. It stands admitted by the demurrer that there was a willful misuser and abuse of the power conferred on this corporation, and a prostitution and perversion of its corporate powers to objects and purposes for which no certificate of incorporation could be properly issued, and which would be against the policy of our laws. It was a clear abuse of the liberal privileges conferred by our incorporation laws for appellant to make use of them for the purposes set forth in the information. And for such abuse and misuser its charter may and should be revoked. *Edgar Collegiate Institute v. People*, 142 Ill. 363, 32 N. E. 494."

In *Dent v. West Virginia*, 129 U. S. 122, the supreme court of the United States, in passing upon the right and power of a state to exact from parties, before they can practice medicine, a degree of skill and learning in that profession upon which the

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community employing their services may confidently rely, and, to ascertain whether they have such qualifications, to require them to obtain a certificate or license from a board or other authority competent to judge in that respect, said:

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified."

It is argued by plaintiff in error that the court erred in admitting in evidence the records of the Illinois courts showing the actions brought by the state of Illinois to revoke and cancel the charters of the Illinois Health Institute, and the Independent Medical College, its successor, and the record of the conviction of Armstrong, the head of these institutions, for the fraudulent use of the mails in operating the same. Clearly, this evidence was competent and material, for the purpose of showing that these pretended colleges were fraudulent institutions, and that the pretended diploma was procured from a fraudulent institution.

But one question remains: Did the court err in refusing the defendant a jury trial? This question must be answered in the negative. This is not one of the actions in which the party is entitled to a jury trial as a matter of right. Trial by jury is guaranteed only in those classes of cases where that right existed at common law. The case at bar falls under the well-recognized

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rules of equity jurisprudence to cancel a license on the ground of fraud, and hence the defendant was not entitled to a jury trial as a matter of right. *McCardell v. McNay*, 17 Kan. 433; *Kimball v. Connor*, 3 Kan. 414.

After a careful examination and consideration of the entire record, and of each of the errors assigned and which have been argued, we are clearly of the opinion that no error was committed by the trial court which would justify a reversal of this cause. It follows that the territory was a proper party to institute this action, upon the complaint of the territorial board of health, and by direction of the governor; that the court had jurisdiction of the subject-matter of the action; and that the evidence fully establishes the allegations of the petition that the license was procured by fraud and deception.

Believing the judgment of the trial court to be right and just, and in consonance with reason and sound morals, the judgment is affirmed.

Burford, C. J., who presided in the court below, not sitting; all the other Justices concurring.

ROBERT A. GAFFNEY v. ALBERT CLINE *et al.*

(Filed September 5, 1907.)

(91 Pac, 855.)

1. **APPEAL—Review—Sufficiency of Evidence.** A judgment will not be reversed by this court on account of the insufficiency of evidence, when the evidence reasonably supports the same.
2. **SAME—Findings of Trial Court—Case.** When a trial court, in a case tried to it without a jury, finds that one of the parties was guilty of fraud and undue influence, and that the other party was incapable of contracting by reason of being intoxicated at the time, and the evidence reasonably supports such findings, they will not be disturbed by this court on appeal, on the theory that they are against the weight of the evidence.
3. **TRIAL—General Findings.** A general finding for a party to an

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action is equivalent to finding in his favor each fact in issue in the case.

(Syllabus by the Court.)

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Affirmed.

Cotteral & Hornor, for plaintiff in error.

Martin, Tibbetts & Green, for defendants in error.

Opinion of the court by

BURWELL, J.: Robert Gaffney, on November 4, 1903, traded to Albert Cline lots numbered seven and eight in block numbered six in West Guthrie, Logan county, for a farm of eighty acres, described as follows: The north one-half of the southwest quarter of section twenty-nine, in township seventeen north, of range one west, in Logan county. The deeds of the respective parties were executed and delivered to P. Jelsma, who was to hold them, as well as a note for three hundred sixty-seven dollars and sixty-seven cents, and a mortgage on the farm land executed by Gaffney to Cline for the difference in the trade, to be held by Jelsma until abstracts were furnished. These papers were sealed up in an envelope upon which was endorsed by the parties the following: "Deliver these papers when called for by R. A. Gaffney or Albert Cline as soon as abstracts show title as per deeds." Jelsma having refused to deliver the papers conveying the eighty acres of land to Gaffney, the latter commenced an action to compel him to do so. Cline filed an answer, which was a general denial, and also alleged fraud and undue influence, and claimed that at the time the papers were executed he was intoxicated and incapable of making a legal contract. The answer contains other defenses, but we will not discuss them, although they have been considered. The court rendered judgment for Cline and against Gaffney for costs, denying plaintiff any relief, and ordered Jelsma to return to Gaffney and Cline the papers executed by them, respectively.

The record really presents the question as to whether or not

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the evidence supports the judgment. We think it reasonably supports it, and therefore must affirm the same. The court evidently concluded that Jelsma, who Cline alleged pretended to act as his agent, conspired with Gaffney to cheat and defraud Cline out of his farm, and that Jelsma tried to get Cline drunk for that purpose. That Cline was drunk there can be no doubt under the evidence, and as to whether or not he was intoxicated to that extent that he was incapable of making a legal contract this court will take the finding of the trial court, it being reasonably supported by the evidence. The whole transaction has the earmarks of a sharp deal and a combination of effort on the part of Gaffney and Jelsma to take advantage of Cline's intoxicated condition; and it is just that they be denied the fruits of such conduct.

The judgment of the lower court is hereby affirmed, at the cost of the appellant.

Burford, C. J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

ELLA LOUDENBACK V. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 1030.)

1. **HOMICIDE—Indictment—Error Not Reversible, When.** Where one is indicted for murder, but the indictment, although sufficient to charge manslaughter in the second degree, is not a good indictment for either murder or manslaughter in the first degree, and the defendant is put on trial for murder, and the jury return a verdict of manslaughter in the second degree, the defendant cannot complain that he was tried upon the theory that the indictment was a good indictment for murder, unless it appears from the record that the defendant may have been prejudiced thereby; and prejudice will not be presumed from the fact alone that the prosecution and the court proceeded upon the theory that the indictment was a good indictment for murder.
2. **CRIMINAL LAW—Appeal—Instructions—Harmless Error.** Where one is on trial for a crime which is divided into degrees, and the court commits error in instructing the jury upon the law

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applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury returns a verdict of guilty of the lower degree, the defendant cannot complain. One can only complain of errors which may have affected his rights.

3. **SAME—Evidence—Conversations of Defendant.** A prosecution may, on a trial, show by the testimony of other witnesses a conversation between a defendant and another party; and it may prove the statements made by both the defendant (which are in the nature of admissions against his interests) and by the other party to the defendant. But it is for the jury to say, from all of the conversation, as to whether or not the statements made by the defendant are admissions against his interests
4. **SAME—Sufficiency of Evidence.** A verdict will not be set aside for lack of evidence where the evidence reasonably supports it.
(Syllabus by the Court.)

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Affirmed.

Lowry & Lowry and Lawrence & Huston, for plaintiff in error.

W. O. Cromwell, Attorney General, Don C. Smith and J. H. Cline, Assistants, for defendant in error.

Opinion of the court by

BURWELL, J.: The defendant, Ella Loudenback, was indicted and tried for murder, and convicted of manslaughter in the second degree.

It is first insisted that the indictment fails to charge the crime of murder. The offense is charged in two counts, and it is clear that the second count of the indictment is insufficient to charge murder, and it is doubtful if the first would stand the test, when measured by the law applicable thereto. Neither of the counts charges manslaughter in the first degree. The language used purports to charge murder, and the theory of the prosecution is that manslaughter in both degrees is included in a charge of murder; and this is true as a general rule. But an indictment for murder includes the charges of manslaughter only when such indictment is a sufficient indictment for murder, unless the language

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used in the indictment is sufficient to charge manslaughter, independent of the charge of murder. The indictment in question sufficiently charges manslaughter in the second degree, and the rule is, if the language used in the indictment charges one of the degrees of manslaughter in such form and manner as to meet the requirement of the statute, it will be sufficient as to that degree of homicide; and the mere fact that the indictment purports to charge murder is immaterial.

But it is insisted that the defendant was tried for murder, when the indictment did not charge that offense. That fact cannot avail, as she was not prejudiced thereby, and, conceding for the sake of argument that the instructions of the court regarding murder were erroneous, the defendant was not convicted of murder. The jury rejected every theory of murder and of manslaughter in the first degree, and no complaint is made against those instructions which relate to manslaughter in the second degree. So far as the defendant is concerned, the effect is the same as though the indictment had been sufficient to charge murder. If the defendant can be said to have been prejudiced, it can only be claimed upon the theory that the defendant was tried for a higher degree of homicide than that of which she was found guilty. No one would claim that that fact alone prejudiced her. If so, then it would prejudice a defendant to charge him with murder, if the evidence on the trial only established manslaughter. Such is not the law. The rule is that where one is on trial for a crime which is divided into degrees, and a court commits error in instructing the jury upon the law applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury returns a verdict of guilty of the lower degree, the defendant cannot complain. One can only complain of error which may have affected his rights. The following cases support the law as stated: *State v. Grote* (Mo.) 19 S. W. 93; *State v. Keeland*, (Mo.) 2 S. W. 442; *People v. Nichols*, 34 Cal. 211; *Gant v. State* (Ga.) 41 S. E. 698; *State v. Costello* (Ia.) 17 N. W. 605; *State v. Rishardson* (S. C.) 24 S. E. 1028; *Jackson v. State* (Wis.)

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64 N. W. 838. In 12 Cyc. page 931, it is said that error in instructions as to a higher degree of crime is harmless, where the defendant is convicted of the lower degree. To the same effect are the following cases: *Colvin v. Commonwealth* (Ky.) 60 S. W. 701; *Stephenson v. State* (Tex.) 24 S. W. 645; *Blackwell v. State* (Tex.) 26 S. W. 397; *Rutledge v. State* (Tex.) 33 S. W. 347; *McCarty v. State* (Tex.) 58 S. W. 77; *State v. Stockwell* (Mo.) 16 S. W. 888; *State v. Gates* (Mo.) 32 S. W. 971; *People v. Boling* (Cal.) 23 Pac. 421.

It is next insisted that the trial court erred in admitting in evidence testimony regarding a conversation between the defendant and her daughter after the homicide. The testimony was that the witness heard the defendant say that she shot the deceased, and the defendant's daughter asked her mother why she killed the deceased, to which the defendant replied that she had to, and the daughter then said to her mother, "No, Mamma, you didn't have to." The record fails to show that the defendant made any reply to this statement. The jury were entitled to have the whole conversation, and then determine from the whole of it as to whether or not any portions of it were admissions on the part of the defendant against her interest. The counsel for the defendant could have shown any reply which the defendant may have made to the statement of her daughter, but they did not see fit to enquire further as to the conversation. It was properly admitted.

The evidence supports the verdict and the judgment is hereby affirmed.

Burford, C. J., who presided in the court below, not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

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TABITHA FRANCES CASSADY *et al.* v. WILLIAM H. MORRIS.

(Filed September 5, 1907.)

(91 Pac. 888.)

1. **JURY—Right to Jury Trial—Exemptions.** A motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury.
2. **HOMESTEAD—Exemption—Tort of Father.** The homestead of the family is exempt to the family and cannot be taken on attachment for the tort of the husband and father.

(Syllabus by the Court.)

Error from the District Court of Kay County; before Bayard T. Hainer, Trial Judge.

Affirmed.

Moss & Turner, for plaintiffs in error.*Sam K. Sullivan* and *W. C. Tetirick*, for defendant in error.

Opinion of the court by

BURFORD C. J.: This cause presents for our interpretation the statutes providing for exemption of the homestead. The plaintiffs in error brought their action in the district court of Kay county against William H. Morris to recover damages for the felonious killing of the husband and father and son and brother of the plaintiffs. The action is one in tort to recover damages. The plaintiffs caused an attachment to issue and be levied upon a farm belonging to Morris in Kay county. The defendant moved to discharge the property from the attachment and seizure upon the ground that it was the homestead of the family. The issue upon the motion to discharge was tried to the court, and the court found for the movant and ordered the property released from the levy. From this order the plaintiffs appealed, and present three alleged errors: First, that the court erred in refusing them a jury upon the trial of the motion to discharge the property; second,

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that the issue was prematurely heard and determined; third, that, suit being to recover damages in tort, no exemption is allowed.

As to the first proposition, we think there is not much room for contention. The constitution of the United States guarantees the right of trial by jury in all suits at common law where the value exceeds twenty dollars. This case does not come within this class. It is not a suit at common law, but a special proceeding governed by statute and is a substitute in a measure for the bill of discovery. Our code, procedure civil, (section 4453, Wilson's Stat., 1903), upon the subject of trials, provides: "Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided." Section 4454: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this code." Upon the subject of attachments, in section 4415, it is provided: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiffs, move to discharge an attachment as to the whole or part of the property attached." Section 4416: "If the motion be made upon affidavits on the part of the defendants or papers and evidence in the case but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to that on which the order of attachment was made." By section 3, art. 2, chap. 24, p. 194, Laws of 1899, the judge at chambers is given authority to dissolve attachments. The issue is formed by a denial of the attachment affidavit, or upon the denial of facts set up in a motion to discharge. None of these affidavits or motions are, properly speaking, pleadings. The issues referred to in section 4453, *supra*, are the issues made by the pleadings in the case. Mere collateral issues that may arise upon motion are not included in the issues triable to a jury. It is evident, taking all the statutory provisions together, that the legislature did not intend that the issue formed upon a motion to discharge an attachment, or to discharge exempt

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property from attachment, should be submitted to a jury. The purpose was to provide a speedy and summary mode of disposing of such questions, and, indeed, we believe it has been the general practice in Kansas, from which state we have borrowed our procedure, as well as in this territory since its organization, to try such questions by the court. We think there was no error in refusing a jury in this case.

The second proposition contended for is that the attached property should not have been dismissed until the plaintiff had secured a judgment, and its status should be determined as of that time. We do not consider this question of much moment. Clearly, if the plaintiff was not entitled to the attachment at the time it was levied, the defendant was entitled to have the property discharged. The law would not require him to have his property encumbered with an apparent lien which had no validity, for the purpose of enabling the plaintiff to secure a valid lien at some future period. The plaintiffs were either entitled to the attachment when it was issued and levied, or they were not entitled to it at all; and the defendant had the right to have this question determined, and it was the duty of the court to hear it at the first available opportunity.

The third contention is that the suit is for a tort, and that there is no exemption from a judgment sounding in tort. Whatever the correct rule may have been prior to the amendment of our exemption laws in 1905, it does not seem that there can be any doubt as to its meaning now. It is provided (Laws 1905, sec. 1, chap. 18, p. 255): "The following property shall be reserved to every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife." The exemption is to the family. How can the family have the home exempt if it may be taken for the wrong of the husband and father? It seems but to ask this question suggests its own

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answer. In this case it is shown that the defendant has a family consisting of a wife and children; that this farm is the homestead and home of the family; that they leased it temporarily, with no purpose of abandoning it, but with the express purpose of returning to it; they had no other home. If the home is exempt to the head of the family, then, as a general rule, it may be taken for his torts, but under our statute the legislature has clearly indicated its purpose by the amendment of 1905 to exempt the home to the entire family from forced sale of any character, regardless of whether the title is in the husband or in the wife, or in both, and this purpose is so clearly apparent that we need not look to decisions of other courts to determine the proper interpretation to be given our statute. If the home of this family can be taken upon a judgment against Morris for his felonious acts, then the law fails entirely of its purposes, and the family is no better situated than if the law had never been changed. Each member of the family residing upon the homestead and in good faith making it a home is equally protected by the statute, and has such an interest as will prevent its forcible seizure for the debts or liabilities of either.

We find no error in the record.

The judgment is affirmed, at the costs of the plaintiffs in error.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

PETER ANDERST V. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

(Filed September 5, 1907.)

(91 Pac. 894.)

APPEAL.—Review—Insufficient Record. When on the trial of a case in the district court the defendant interposes a demurrer to plaintiff's evidence, which is sustained by the court and the cause dismissed, such ruling will not be reviewed by this court on appeal, unless the case-made contains all of the evidence introduced upon such trial; and where the case-made contains a

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statement that all of the evidence introduced upon the trial is contained therein, but the record upon its face shows that it does not and that a material plat or chart was omitted therefrom, the record is the best evidence, and will prevail over such statement.

(Syllabus by the Court.)

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Affirmed.

W. S. Roark, A. C. Towne and T. J. Womack; for plaintiff in error.

Henry E. Asp, Charles H. Woods, George M. Green, and Jesse J. Dunn, for defendant in error.

Opinion of the court by

BURWELL, J.: This action was brought by the appellant for the death of his infant child, alleged to have been caused by the negligence of the defendant company. When the plaintiff rested his case, the defendant company interposed a demurrer to the evidence, which was sustained, and the cause dismissed at the cost of the plaintiff.

On the trial of the case, a certain plat or chart showing the location of the plaintiff's house from which the infant strayed, the fences, railway track, crossing, and the location of different important objects, and the conditions generally in the immediate place and vicinity of the accident, was admitted in evidence. This chart was used in examining the different witnesses, and, instead of detailing conditions, references were made to the objects on the chart, which were designated by letters, etc. This chart is omitted from the case-made, and, although the supreme court gave leave to amend the case-made, this omission of evidence was not supplied. The parties and the trial court were of the opinion that it was necessary to exhibit this chart or plat to the jury and have the witness testify in relation thereto, and this court should have the benefit of the same in reviewing the evidence. This omission

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is fatal to a consideration of the evidence. This identical question was decided in the case of *Pappe v. American Insurance Co.*, 8 Okla. 97, 56 Pac. 860. The court said:

"When the case-made contains a statement that all of the evidence introduced upon the trial is contained therein, but the record itself shows upon its face that it does not, and that material written instruments were omitted therefrom, the record is the best evidence and will prevail over such statement."

The same rule applies to photographs, plats, maps, or instruments of any kind, and where such exhibits are omitted from the evidence, it will not be considered. *Board v. Wagner* (Ind. Supp.) 38 N. E. 171; *Marvin v. Seger* (Ind. Supp.) 44 N. E. 310; *Saxon v. State* (Ind. Sup.) 18 N. E. 268; *Cowger v. Land* (Ind. Sup.) 12 N. E. 96; *Harris v. Tomlinson* (Ind. Sup.) 30 N. E. 214; *Stout v. Turner* (Ind. Sup.) 26 N. E. 85.

The ruling on the demurrer to the evidence cannot be reviewed because the case-made does not contain all of the evidence introduced upon the trial, and on which the ruling was based.

The judgment of the lower court is affirmed, at the cost of appellant.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

ALLEN DUDLEY & COMPANY V. O. M. CLEVINGER *et al.*

(Filed September 5, 1907.)

(91 Pac. 908.)

1. **SHERIFFS—Fees and Costs—Return—Conclusiveness.** The return of a sheriff on an order of replevin is conclusive and binding against him; and where he shows by his return that he delivered cattle seized by him under the writ to the defendant, with the consent of the plaintiff, within ten days after taking such property under such writ, he cannot be allowed as a part of the costs of the case for feeding and caring for such cattle for a period of seventy days.

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2. * **SAME—Proper Expenses in Replevin.** Where a sheriff takes charge of property under an order of replevin, he can only be allowed for caring for the same during the time that he is in possession thereof.

Error from the District Court of Canadian County; before C. F. Irwin, Trial Judge.

Reversed and remanded.

Blake, Blake & Low, for plaintiff in error.

J. W. Clark, H. L. Fogg, and W. L. Baxter, for defendants in error.

Opinion of the court by

BURWELL, J.: The plaintiffs, Allen Dudley and S. L. Dudley, partners, doing business as Allen Dudley & Co., on February 2, 1904, commenced an action against O. M. Clevenger and A. Baird for the possession of sixty-three head of cattle, in the district court of Canadian county. On the 4th day of February, 1904, having filed the necessary affidavit and bond, the clerk of the court issued a writ of replevin for these cattle, which was placed in the hands of the sheriff who duly served the same on February 5, 1904, by taking possession of the cattle. The sheriff retained possession of these cattle for twenty-four hours, and at the end of that time delivered them to the defendant, O. M. Clevenger, with the consent of the plaintiffs' attorney. On November 21, 1904, the action was dismissed by plaintiffs at plaintiffs' cost. On November 26, 1904, the sheriff filed in the clerk's office a bill for feeding and caring for these cattle, which, omitting the caption, was as follows:

"Sheriff's costs for feeding and pasturing cattle replevined in the above entitled case:

"Feeding fifty-nine head for 70 days at 15c per head per day.....	\$619.50
"Pasturing ditto for 3 1-2 months at 50c per head per month	103.25
	\$822.75

"J. C. OZMUN, Sheriff."

This bill was taxed as costs by the court against the plaintiffs. A motion was filed to retax the costs, which was overruled, and the plaintiffs appeal from such order, and the only question presented by the appeal is the allowance of this item of \$822.75 to the sheriff for caring for the cattle.

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Section 4352 of Wilson's Annotated Statutes of Oklahoma provides for the filing of the affidavit of replevin and what such affidavit shall contain; and section 4353 fixes the conditions of the replevin bond; and then section 4354 refers to the order or writ of replevin. We here quote it, together with other sections of the statutes in relation thereto:

"Section 4354. The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein.

"Section 4356. The sheriff shall execute the order by taking the property therein mentioned. He shall also deliver a copy of the order to the person charged with the unlawful detainer of the property, or leave such copy at his usual place of residence.

"Section 4357. If within twenty-four hours after service of the copy of the order, there is executed by one or more sufficient sureties of the defendant, to be approved by the sheriff, an undertaking to the plaintiff, in not less than double the amount of the value of the property, as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff, if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the sheriff shall return the property to the defendant. If such undertaking be not given within twenty-four hours after service of the order, the sheriff shall deliver the property to the plaintiff.

"Section 4358. The plaintiff may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the defendant, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he must be deemed to have waived all objections to them. When the plaintiff excepts, the sureties must justify, upon notice, as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify."

From these sections of the statutes it will be observed that the law directs the sheriff to seize the property, and, if the defendant fails to execute a bond within twenty-four hours after the service of the writ, conditioned for the delivery of the property to the

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plaintiff if such delivery be adjudged, the sheriff shall deliver the property to the plaintiff; but, if the defendant executes such bond, then the plaintiff has twenty-four hours in which to except to the sureties. This makes forty-eight hours that the sheriff may hold the property replevined; and, if he desires, he may also hold it a reasonable length of time after this, to afford the sureties an opportunity to justify, and during all of this time he is entitled to charge up as costs in the case the expenses of caring for such property. But the law does not contemplate that the sheriff shall remain in possession of property seized by him in replevin actions for a long period of time, covering weeks and months. Under the statutes above quoted either the plaintiff or the defendant should be given possession of the property within a few days at most after its seizure by the sheriff. It is true that the parties to the suit might stipulate as to what may be done with the property, and such agreement would be binding. If the property is retained, or delivered to some one else, by virtue of an agreement, the return of the sheriff should show that fact. The sheriff's return should always show what he has done with the property.

Turning to the record in the case under consideration, we find that the sheriff states in his return to the order of replevin that he received the same on February 4, 1904, and served it by taking into his possession the property in controversy, describing it, and then states that, "after keeping the same for the period of twenty-four hours, I delivered the above-described property to O. M. Clevenger, with consent of attorney for the plaintiff." The return is duly signed by the sheriff, and was filed in the office of the clerk of the court on February 15, 1904, or ten days after the order of replevin was received by him. This return shows that the sheriff returned the property to the defendant, O. M. Clevenger, with the consent of the attorney for the plaintiff, and this delivery of the property to the defendant could not have been later than February 15, 1904, for that is the day on which the return was filed with the clerk of the court. If this return is true, the sheriff could not have had possession of the cattle for a period of seventy-

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days, for which he put in his claim. The expense bill for caring for these cattle is not accompanied with any explanation or showing as to why it should be allowed. Under the return made by the sheriff, in no circumstances could he charge for caring for these cattle for a period of more than ten days. He took charge of them on February 5, 1904, and delivered them to the defendant, O. M. Clevenger, before making his return on February 15, 1904. A fair interpretation of his return is that he delivered the cattle to the defendant immediately after the expiration of twenty-four hours.

Under the law the sheriff is bound by his return. In 18 Ency. of Pleading and Practice, page 981, the law is stated as follows: "It is the general rule that when an officer's return comes in question in a proceeding wherein rights may be based thereon as against the officer, he may not be heard to contradict it."—citing authorities. In the case of *Cox et al. v. Patten et al.* (Tex.) 66 S. W. 64, the court of civil appeals for the state of Texas, in a case where a sheriff was sued for conversion, said: "In an action against a sheriff for conversion of cotton sold under execution, the sheriff's return endorsed on the execution showing a levy upon the cotton, precludes him from denying the legality of such levy." The supreme court of Colorado, in the case of *People, to Use of Kenfield, v. Finch et al.*, 76 Pac. 1120, in discussing the effect of an officer's return, said: "Did the facts pleaded in the second, third, and fourth defenses constitute a defense to the cause of action alleged in the complaint? As to the second defense *Bishop v. Poundstone*, 11 Colo. App. 73, 53 Pac. 222, was an action against a constable and his sureties, upon his official bond, for damages by reason of the unauthorized release by the constable of property levied upon under writs of attachment. The constable's return on the writs was that he had levied upon the property, and afterwards released it. At the trial the constable was permitted to testify in contradiction of his return upon the attachment writs. The court said: 'The officer was concluded by his returns, as were also the sureties on his bond, and the evidence

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was inadmissible. An incorrect return may be amended so as to show the facts, but the amendment must be made in the cause in which the writ issued, and when made it becomes the return. Except upon application to vacate or amend in the court having jurisdiction of the writ, the incorrectness of the return cannot be shown by the officer or by the parties or privies to the suit. Freeman on Executions, §§ 365, 366. If the return of an officer did not, as against himself and all parties connected with the litigation, import absolute verity, the records of the courts would be unreliable, and the administration of justice involved in uncertainty and confusion.’”

The authorities are practically uniform in holding that an officer is concluded by his return. The return may be amended, but, whatever the return, it is conclusive as against the officer making it. Therefore it necessarily follows that the trial court committed reversible error when it allowed the sheriff for feeding and caring for the cattle seized by him under the order of replevin for a period of seventy days, when the sheriff’s return affirmatively shows that he could not have had the cattle in his possession for a period to exceed ten days. If the return made by the sheriff was incorrect, he should have obtained leave of court and corrected it. Without such amendment, he is bound by the recitations therein. It is possible that the sheriff is entitled to compensation for keeping these cattle for the period that elapsed between the time he made the levy and the filing of the return. His return shows no expense therefor; but, desiring that full justice may be done, instead of entering judgment on the record as presented, the case will be reversed and remanded with directions to disallow all of the item of \$822.75 for feeding and pasturing the cattle in question, unless the sheriff shows himself entitled thereto under the rules stated in this opinion.

It is so ordered.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

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TEST OIL COMPANY, *a Corporation*, v. ISAAC V. LATOURETTE *et al.*

(Filed September 5, 1907.)

(91 Pac. 1025.)

1. **COVENANTS—Construction—Restrictions Not Favored.** Restrictions and prohibitions of the use of real property are not favored in the law, and the terms of such covenants will not be enlarged by implication, but confined to their accepted usage and the clear intention of the parties expressed therein.
2. **SAME.** The intention of the parties, being clearly expressed in the terms of a covenant to prohibit the drilling of oil and gas wells upon a certain tract in all deeds for the conveyance of any and all portions thereof, will not be enlarged by implication to include the prohibition in a lease on said tract.
3. **SAME—Deed—Lease—Covenant Construed.** The following covenant in an oil and gas lease, being a restriction upon the alienation of the land and clearly expressing the intention of the parties, will be strictly construed: "Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them for any part of said La Tourette's Second Addition to said town of Cleveland prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second Addition." **Held**, that the general usage and acceptance of the term "deed" in the above clause clearly expressing the intention of the parties, did not include "lease," and thereby prohibit the first parties from leasing said tract for the purpose of drilling oil and gas wells thereon.

(Syllabus by the Court.)

Error from the District Court of Pawnee County; before Bayard T. Hainer, Trial Judge.

Affirmed.

George & Julian and Biddison & Eagleton, for plaintiff in error.

Sornborger & Williams and Wrightsman & Diggs, for defendants in error.

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GARBER, J.: On January 27, 1905, the defendants, Isaac V. LaTourette and his wife, executed and delivered to John L. Moran

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what is commonly known and designated as an oil and gas lease upon a certain portion of the northwest quarter of section nine (9), in township twenty-one (21) north of range eight (8) east I. M., which tract, so far as the particular description is relative to this case, lies immediately east of the east line of what is known as "La Tourette's Second Addition to the town of Cleveland," in Pawnee county, Oklahoma Territory (which tract hereafter will be designated as "Second Addition"). On the 6th day of March, 1905, Moran assigned his lease to the plaintiff herein, the Test Oil Company, and on the 8th day of March, 1905, the lease and the assignment thereof was filed for record in the office of the register of deeds of Pawnee county, Oklahoma Territory. On the 8th day of March, 1905, La Tourette and wife executed and delivered a second oil and gas lease to S. W. Lawrence covering a certain tract lying immediately west of the east line of Second Addition, excepting certain lots previously sold by La Tourette, but which are not material to description or issue in this case. Subsequently, Lawrence assigned an undivided one-half interest to the defendants M. M. and S. H. Sornborger, as Sornborger & Brother, and to the defendant Melrose Oil Company.

The following diagram fairly represents the location of the lands covered by the leases of the respective parties to this controversy, in so far as they are involved in this cause:

Town of Cleveland	La Tourette's Second Addition. E. Line of Second Addition	Part of Test Oil Co's Leasehold E. of La Tour- ette's Second Addition, and N. of La Tourette's addition.	TEST OIL CO.'S LEASEHOLD.
Defendant's Leaseholds.			
LA TOURETTE'S ADDITION.			

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The boundary line between the tract leased to the plaintiff and that leased to the defendants is the east line of Second Addition. Plaintiff's lease also includes a small tract in the northwest corner of the tract designated as defendants' leasehold, but in no way affects the issue in this case.

The defendants having proceeded to drill wells for oil and gas on the tract of land covered by the lease known as Second Addition, the plaintiff brought this action to restrain and enjoin each and all of them from drilling or attempting to drill or permitting other persons, companies, or corporations to drill any oil or gas wells upon said tract, excepting certain lots therein described, and from taking or marketing any oil or gas from any well or wells that may have been drilled by them, other persons, companies, or corporations under and by virtue of any right which said defendants may have obtained to said Second Addition, alleging, substantially, that the tract known as Second Addition, excepting lots therein described, was so situated with reference to the tract covered by the lease assigned to the plaintiff that if any oil or gas well or wells were drilled thereon, or oil or gas taken therefrom, the oil and gas would be drained from under the tract covered by the lease assigned to the plaintiff to its irreparable injury and damage, and that upon the final hearing of this action plaintiff asked that the defendants be perpetually enjoined from drilling upon said tract of land; and that an accounting might be had of any and all damages which the said plaintiff sustained by reason of producing gas or oil wells which the defendants may have drilled. A temporary restraining order granted in the probate court, on motion of defendants, was dissolved in the district court upon the ground that the petition did not state facts sufficient to constitute a cause of action. From the judgment of dissolution, this appeal was taken.

An examination of the petition and motion discloses that the controversy in this case is waged over the construction of plaintiff's lease, and the validity of a certain clause therein. For perspicuity and intelligible construction, we incorporate the lease

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entire, which reads as follows, omissions acknowledgements, assignments, and recording memoranda thereon:

"OIL AND GAS LEASE.

"Agreement, made and entered into on the 27th day of January, A. D. 1905, by and between Isaac V. La Tourette and his wife, Armada H. La Tourette of the town of Cleveland, county of Pawnee and territory of Oklahoma, parties of the first part, and John L. Moran, of Bartlesville, in the Indian Territory, party of the second part,

"Witnesseth: That the said parties of the first part for and in consideration of the sum of sixteen hundred and fifty dollars to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, on the part of the said party of the second part to be paid, kept, and performed, have granted, demised, leased and let and by these presents, do grant, demise, lease and let unto the party of the second part, his heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe line and of building tanks, stations and structures thereon, to take care of said products all that certain tract of land situated in Pawnee county, territory of Oklahoma, to wit: E. 1-2 of S. 1-2 of N. W. 1-4 sec. 9, town. 21, range 8 east — acres, all that part of the west half of the south half of the northwest quarter of section 9, town. 21, range 8 east lying north of La Tourette's Addition to the said town of Cleveland and east of La Tourette's Second Addition to said town of Cleveland, and a tract of land 100 feet north and south and 127 feet east and west lying in the northwest corner of said S. 1-2 of N. W 1-4 of said sec. 9, town. 21, range 8, east — acres.

"It is agreed that this lease shall remain in force for the term of one year from this date and as long thereafter as the above described premises shall be operated for the purpose of producing oil or gas or so long as oil or gas is produced in paying quantities.

"In consideration of the premises the said party of the second part covenants and agrees: 1st, To deliver to the credit of the first party, their heirs, assigns, executors and administrators, free of cost in the pipe line to which the wells may be connected the equal one-sixth part of all the oil produced and saved from the leased premises; 2nd to pay one hundred dollars per year for

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the gas from each and every well drilled on said premises, the product from which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from the said well is used. In case gas is found in marketable quantities, parties of the first part shall have gas for domestic purposes free by making their own connections.

"Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and well to be begun on said tract above described as 100 by 127 feet within thirty days after the well now being drilled on Jordan lease is completed. And further to complete a well for oil and gas on said premises within ninety days from the date hereof or pay at the rate of twenty-five dollars in advance for each additional thirty days such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payment may be made direct to the lessors or by check mailed to them at Cleveland, Oklahoma Territory, or by check deposited to the credit of Isaac V. La Tourette in the First National Bank in said town of Cleveland.

"No well to be drilled on said land nearer the section line than a point twenty-five feet from the west line on Breer and Anderson lot. Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them for any part of said La Tourette's Second Addition to said town of Cleveland, prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second Addition.

"It is agreed that the said second party is to have sufficient water from the premises to run all necessary machinery; at any time to remove all machinery and fixtures placed on said premises; and further upon the payment of one dollar at any time by the party of the second part his heirs, executors, administrators, or assigns, to the parties of the first part, their heirs or assigns, said party of the second part, his heirs, executors, administrators or assigns, shall have the right to surrender this lease for cease and determine and this lease become absolutely null and void.

"Witness the following signatures and seals.

"ISAAC V. LATOURETTE, [SEAL]

"ARMEDA H. LATOURETTE, [SEAL]

"JOHN L. MORAN, [SEAL]

"Witness: TOM GEORGE,
"JULIA ROGERS."

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An examination of the essential conditions of the above lease discloses that, for and in consideration of the payment of sixteen hundred and fifty dollars (\$1,650.00), LaTourette and wife leased unto Moran or his assigns a certain tract of land (not including any part of Second Addition leased by these defendants), therein described, for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and building tanks, stations, and structures thereon for the purpose of taking care of the product. Said lease was for the period of one year from the date thereof, and thereafter as long as the leased premises should be operated for the purpose of producing oil or gas, or as long as oil or gas was produced thereon in paying quantities. An additional consideration to the lessor, or his assigns, was the delivery in the pipe line to which the wells might be connected the equal of one-sixth of all the oil produced and saved from "the leased premises," and one hundred dollars (\$100.00) per year for the gas from each and every well drilled on said premises, the product of which was marketable. An additional rental was "sufficient gas for domestic purposes to the lessor, or his assigns, in case gas was found in marketable quantities." Payment of twenty-five dollars (25.00) for each additional thirty days, after a certain period, was stipulated to be paid "direct to the lessors," or by mailed check, or deposit in First National Bank at Cleveland. Party of the second part, or his assigns, reserved the right to remove all their machinery and fixtures, and upon the payment of one dollar (\$1.00) at any time to "surrender this lease, and this lease to become absolutely null and void." Said lease contained the further covenant, and the one upon which plaintiff relies, that "said parties hereby further agree that they will in and by any deed hereafter executed by them or either of them, for any part of the said LaTourette's Second Addition to the said town of Cleveland, prohibit any drilling for oil or gas upon any land so hereinafter conveyed in said Second Addition." It is not alleged that the defendants ever trespassed upon the leased land of the plaintiff, or that they ever drilled, or attempted to drill, wells thereon, or interfered in any way with

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plaintiff's possession. Plaintiff alleges, however, that the defendants have and will continue to drill oil and gas wells upon the tract leased to the defendants and known as Second Addition and bases its action to enjoin the defendants from drilling upon said tract upon that clause in their lease containing the restriction upon the alienation of any portion of Second Addition by deed, and proceed upon the theory that it is a covenant which runs with the land, binding all subsequent purchasers or lessees, and prohibits LaTourette and wife, and all persons claiming through or under them, from in any way exploiting the gas and oil supply which may lie underneath the surface of defendant's leased premises.

As all the agreements between the parties are merged in the written lease, plaintiff's contention must stand or fall upon the construction of its terms. It must be conceded that the fee of the tract known as Second Addition and the right to possession, excepting lots sold, remained in LaTourette and wife without restriction, except in case of transfer by deed, and that plaintiff had no lease thereon. They could, if so disposed, drill a thousand wells upon Second Addition without violating any of the conditions of plaintiff's lease, and, likewise, could they do so by their agents. The oil and gas beneath the surface belonged to them so long as it remained there and was under their control, but in case it should escape their ownership would cease. If, by reason of wells drilled on plaintiff's leased premises, the oil or gas under Second Addition would flow therein and become subjected to the control of plaintiff, it would then become the property of plaintiff; and the same would be true of Second Addition in wells drilled by LaTourette and wife, or lessees. It is the subjection to control that determines the ownership. *Westmoreland & Cambria Natural Gas Co. v. Ira DeWitt et al.*, 130 Pa. St. 235. 5 L. R. A. 731.

Plaintiff claims, however, that LaTourette and wife could not lease Second Addition to anyone for oil or gas purposes, because the restriction by deed included restriction by lease, and that the restriction was for a valuable consideration, and for their especial protection. With this construction we can not agree. It is cer-

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tainly a natural and warranted deduction from the language of the clause upon which plaintiff relies, and the peculiar situation and relationship of the parties, to say that their intention is clearly expressed in the terms of the covenant limiting the restriction to the conveyance by deed only. Ordinary business precaution would reserve Second Addition for LaTourette and wife, and, being interested to the extent of one-sixth of the oil output on plaintiff's leased premises adjoining, it was only natural for the lessee to conclude that interest in the output of the production on both tracts by the lessor would preserve his (the lessee's) interests, and that restriction by deed would prevent the drilling of numerous wells by different lot owners who would not be interested in the amount of production on plaintiff's tract. If this was not the intention of LaTourette and wife, why did they reserve Second Addition? The reservation must have been for some purpose, and what would be more natural for them than to reserve Second Addition to themselves for their own exploitation, or to await the developments of the oil and gas supply on plaintiff's leased premises? If the lessee desired protection from the business sagacity of the owners to the extent herein demanded by his assignees, he should have leased the entire tract, or conditioned his lease with a covenant that LaTourette and wife should not drill wells on Second Addition, or permit others to do so for them, or in case of the leasing of said tract it should be with the same restriction as that provided for in case of conveyance by deed. Not having done so, the court is now called upon to say that because LaTourette and wife covenanted that, in case they should deed any part of Second Addition to other parties, they would in such conveyance prohibit their grantee from drilling for oil or gas, they have thereby in legal effect prohibited themselves from drilling on Second Addition or leasing the same to others without restricting them from drilling thereon. The terms of the covenant will not permit of such a construction. They are plain, unambiguous, and certain. Even in case of doubt such a construction would be denied. In this country land is one of the chief objects of trade and investment. "Mud and civilization

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go together." As the latter advances, the transfer of the former becomes more frequent. Just in the degree that the temporary owner of a tract of land is permitted to impress his notions or caprices upon the fee restricting its future alienation, just in that degree does it hamper the freedom and facility of its exchange in trade and destroy that confidence which has given it the reputation of being the subject of safe and sound investment. Hence restrictions upon the alienation of the fee in land are repugnant to trade and commerce, and are looked upon with disfavor by the law. Nothing will be taken by implication or intendment. New conditions will not be inserted by construction. The expression of the intention of the parties will be gathered strictly from the terms employed, and the inquiry at the close of the examination will be: "Is it so nominated in the bond?"

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right clearly. It can not be established by intendment or presumption. *Minneapolis Western R. Co. v. Minneapolis, etc., Co.*, 58 Minn. 128; *Polson v. Ingram*, 22 S. C. 541. In *Clark v. DeVoe*, 124 N. Y. 120, 21 Am. St. Rep. 652, it was held that only by the use of plain and direct language on the part of the grantor should it be held that he created a right in the nature of an easement and attached to one parcel of land as the dominant estate and made the other servient thereto. It is contrary to the well recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by the grantee, all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions. *Hutchinson et al. v. Ulrich et al.*, 145 Ill. 336, 21 L. R. A. 391. Covenants restraining the use of real property, although not favored, will nevertheless be enforced by the courts, where the intention of the parties is clear in their creation and the restrictions or limitations are confined within reasonable bounds. In construing such covenants, effect is to be given to the intention

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of the parties as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction and the object had in view by the parties; but all doubts must be resolved in favor of natural rights and the free use of property, and against restrictions. 11 Cyc. 1077, 1078, and authorities therein cited.

It is conceded that there has been no conveyance by deed of any portion of Second Addition to the defendants herein, but that their right to drill wells thereon is by virtue of the terms and conditions of an oil and gas lease from LaTourette and wife to S. W. Lawrence, similar in form to the lease of plaintiff as above set forth. Numerous authorities are cited by counsel as supporting their contention that the term "deed" in the restrictive clause should be construed to prohibit by "lease." Under various statutes, and within its generic sense, the courts have frequently held that the term "deed" included a mortgage, bond, will, and other instruments in writing under seal; but the term "deed" is more frequently used, however, in a more limited sense as meaning a written instrument duly acknowledged by competent parties conveying the title in land. A stipulation to give a deed to land contracted to be sold would certainly not be fulfilled by the delivery of a lease. Blackstone says that "deeds" serve to convey the property of lands and tenements from man to man, and that they are commonly denominated "conveyances." The word "deed," as used in the contract whereby one of the parties obligates himself to make a deed to the other, imports that the conveyance shall give a sufficient title. *Parker v. McAlester*, 14 Ind. 12, 16. The word "deed" is an apt word to signify the transmission of real estate. *Dunham v. Marsh*, 52 N. J. Eq. 256, 30 Atlantic, 473, 474. The common usage and acceptance of the term "deed" undoubtedly means the conveyance of real estate, and that was the sense in which it was used in plaintiff's lease. Said first parties agree that they will in and by any deed hereafter executed prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second Addition, is

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the substantial language of the clause. Conveyed in what manner? By "deed," not by "lease."

A deed of conveyance is a sealed writing, signed by the party to be charged, which evidences the terms of the contract between the parties, whereby the title to real property is transferred from one to the other *inter vivos*, and this is the more usual and specific, though somewhat restricted, meaning of the word "deed." Am. & Eng. Encycl. of Law, 91; Bouvier's Dictionary; Abbott's Law Dictionary; Anderson's Law Dictionary.

In *Eaton v. White*, 18 Wis. 519, it was held that a deed was an instrument in writing duly executed and delivered conveying real estate.

In *Lockridge v. McCommon*, 90 Tex. 234, 38 S. W. 33, a deed was held to be the act or instrument by which property in real estate is conveyed.

In *Dudley v. Sumner*, 5 Mass. 438, 472, a deed was said to be a method by which the title and possession of real estate is transferred from one person to another.

In *Consolidated Coal Company v. Peers*, 150 Ill. 344 a written agreement by the owner of coal land giving to another the exclusive right to mine coal thereon for a term of years was held to be a "lease."

In *Malcomson v. Vappoo Mills* (U. S.) 85 Fed. 907, 908, an instrument which gives the exclusive right to enter upon lands and to dig and mine phosphate, rocks, and other minerals, and to carry them away and sell for his own use for a term of years on a certain royalty, was held to be a "lease."

In *Harris v. Ohio Oil Company*, 57 Ohio St. 118, 48 N. E. 502, 506, it was said: Where the owner of land, for a valuable consideration, grants the land described to the other party to a contract for the purpose and with the exclusive right of drilling and operating for oil and gas for a certain number of years, the instrument is a "lease" on the land for the purpose and period limited therein.

In *Young v. Ellis*, 91 Va. 297, 21 S. E. 480, it was said: The

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owners of land granted to another the right to enter thereon to test and search for minerals and oil and to mine and quarry thereon; the second party to have the right to erect buildings and machinery for work in mining, and to pay twenty-five dollars (\$25.00) per year, if minerals were not mined, and to pay a royalty on all ores shipped. The instrument was termed a "lease" and was to continue ninety-nine (99) years. *Held*, that the instrument was a "lease."

From the above authorities, which might be multiplied many times, it is clearly seen that the oil and gas lease from LaTourette and wife to S. W. Lawrence and his assigns was such an instrument as the courts will hold to be a "lease," as contradistinguished from a "deed," and therefore did not come within the clause restricting the conveyance of any portion of Second Addition by deed prohibiting grantees from drilling for oil or gas thereon. The conclusion upon this question being decisive of the case, it is unnecessary to determine whether or not the clause in plaintiff's lease is such a restriction upon the conveyance of land as would be void as against public policy, or whether or not it is such a covenant as would run with the land binding the subsequent owners thereof, or whether or not it was a personal one between the original parties thereto.

The judgment of the lower court dissolving the injunction will therefore be affirmed.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

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(Filed September 5, 1907.)

(92 Pac. 147.)

ATTACHMENT—Claims by Third Persons—Void Assignment—Burden of Proof. Where an assignment for the benefit of creditors is void, but the assignee has taken possession of the property, and the sheriff levies upon such property under an order of attachment in an action against the assignor, and finally sells the property under an order of sale which recites the judgment of the

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court for the amount recovered in the case, and also an order sustaining the attachment and for the sale of the property, in an action by the assignee against the sheriff for conversion, the burden of proof is upon the assignee to establish his right to recover by a preponderance of the evidence. In such circumstances the order of sale, which was regular upon its face, will prevail over the void assignment; and, where the record shows that an assignment is void, proof of such assignment will not defeat an attachment proceeding against the assignor. The property will be treated as the property of the assignor and measured by the same rules that would obtain without said assignment, and even possession of the property by the assignee at the time of the attachment will not inure to his benefit.

(Syllabus by the Court.)

Error from the District Court of Canadian County; before Clinton F. Irwin, Trial Judge.

Affirmed.

W. M. Wallace, for plaintiff in error.

John W. Clark, for defendant in error.

Opinion of the court by

BURWELL, J.: One Mrs. F. Baughman, on June 28, 1905, executed and delivered a deed of assignment for the benefit of creditors to George E. Bingham, but the deed was not acknowledged, nor had it ever been recorded, as provided by law. On July 28, 1905, the assignee took possession of the property. On August 4, 1905, one Emma A. Eastland, having commenced suit in the probate court of Canadian county against the assignor, Mrs. F. Baughman, caused an order of attachment to issue from that court, and the sheriff, the defendant in error herein, levied the same upon the property in the hands of the assignee, took possession of the property, and subsequently sold the same under an order of sale issued from the probate court; which order of sale recited the bringing of the suit, the levying of the attachment, the judgment of the court for the amount due and sustaining the attachment and directing that the attached property be sold.

This suit is by the assignee against the sheriff for conversion of the property. The lower court rendered judgment for the de-

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defendant. Can the judgment be sustained? By section 304 of the statutes of Oklahoma of 1893, it is provided:

“An assignment for the benefit of creditors must be recorded, and the inventory required by section eight filed with the register of deeds of the county in which the assignor resided at the date of the assignment,” etc.

Section 302 of the same statute provides that: “Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file in the manner prescribed in section three hundred and four a full and true inventory, showing, first: All of the creditors of the assignor,” etc. And then it is declared in section 306 that: “An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, if the assignment is not recorded, and the inventory required by section eight filed, pursuant to section ten (304) within twenty days after the date of the assignment * * *”

The assignment in question is void as to creditors; but has the sheriff justified under his original writ of attachment and order of sale so as to protect him against the claim of the plaintiff? The plaintiff was rightfully in possession of the property, and under the deed of assignment was entitled to hold possession of the property and sell it and pay the debts of the assignor; and no one could interfere except it be a creditor of the assignor, or a purchaser or encumbrancer in good faith and for value, or perhaps the assignor himself on the ground that the assignee had not complied with the law.

But the defendant in this case seeks to justify the taking of the property from the plaintiff on the ground that as a sheriff he seized the same under an order of attachment. A careful examination of the record will show that the sheriff failed to prove on the trial that there was any indebtedness due from the assignor to the plaintiff in the attachment suit. This was held necessary in a case of alleged transfer in fraud of creditors when the sheriff relied upon the writ of attachment. *Marrinan v. Knight*, 7 Okla.

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419, 54 Pac. 656. And in the same case it was also held that to justify under an execution it is necessary for the sheriff to prove the judgment on which it rests. That was not done in this case. In the case of *Marrinan v. Knight, supra*, the court quotes as follows from an opinion of the supreme court of Wisconsin in the case of *Bogart v. Phelps*, 14 Wis. 95:

"In case of an action by the party against whom the process issued, the process itself, being valid on its face, constitutes a complete justification. In case of suit by another, claiming title to the property seized under such party, which title is contested on the grounds of fraud, he must, in addition to showing that he acted under such process, show that he acted for a creditor. When he acts under process of execution, this is done by producing the judgment on which it issued. If it be mesne process, then the debt must be proved by other competent evidence. This proof, however, is required not because it affects the process, or is in that respect necessary to protect the officer, but because it affects the title to the property in question. No one but a creditor can question the title of the fraudulent vendee, and hence he must show that the relation of debtor and creditor exists between the party against whom the attachment or execution ran and the person in whose behalf it was issued. It is a necessary link in the chain of evidence by which fraud is established."

Chief Justice Burford, in commenting upon the above quotation, said:

"The learned chief justice has plainly and tersely stated the law applicable to the two classes of cases wherein an officer may justify the seizure of property on execution or attachment, and the law, as stated, is well supported by authority."

This is the case on which the appellant relies for a reversal of the judgment of the lower court. We are still satisfied with the law as stated in the case of *Marrinan v. Knight*, but the facts involved in that case are entirely different from the case at bar. The grantee in the *Marrinan-Knight* case claimed to be a purchaser for value. The conveyance of the property appeared to be regular, and the attaching creditor claimed that it was transferred for the purpose of defrauding creditors. In the case before us

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the deed of assignment is void as against creditors of the assignor, and although the sheriff would have been compelled to prove an indebtedness from the assignor to the attaching creditor, or prove a valid judgment against the former and in favor of the latter if the assignment were regular, even though it were made to defraud some of his creditors, still we are in reason bound to hold that an attachment or execution regular and valid upon its face will prevail over a deed of assignment which is void as to creditors, in an action by the assignee against the sheriff for conversion of the property by reason of the sale of the property on an order of sale in the attachment suit. As between the sheriff and the assignor, the sheriff is protected by the orders of attachment and sale. The record shows that the assignee claims no interest in the property except as assignee, and as he was plaintiff in the case below the burden of proof was upon him to show that the sheriff took property in which he was interested; that is, the burden was upon him to prove his right to recover by a preponderance of evidence. As the assignment was void, the assignee had no greater rights than the assignor would have had. The legal title had not yet passed under the assignment law, and the sheriff had the lawful authority to treat the property as that of the assignor.

In the case of *Bartlett v. Teah*, 1 Fed. 768, Judge Caldwell said:

“The assignee, in a voluntary deed of assignment to pay creditors, is not a purchaser for value; he has none of the equities of such a purchaser, and in a court of law he must stand on his naked legal title, which he can only acquire in the mode prescribed by the statute.”

If the issue between the rights of the attaching creditor and the assignee had arisen in a case wherein the burden was on the attaching creditor, then the rule announced in the case of *Marrian v. Knight* would prevail and the attaching creditor would have to show an existing indebtedness, or an execution creditor a valid judgment in his favor; but as the assignment, under the express provisions of the statute, is void, even the possession of

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the property cannot assist the claims of the assignee. The law will simply treat him as holding the property as the agent of the assignor. The case of *Bartlett v. Teah* is instructive upon this point of the controversy, and fully sustains the view taken herein.

The judgment of the lower court is hereby affirmed, at the cost of the appellant.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

CANADIAN COAL COMPANY V. G. C. ELDRIDGE.

(Filed September 5, 1907.)

(92 Pac. 151.)

JUSTICES OF THE PEACE—Appeal—Taken to Probate Court, When.

Under the provisions of section one of article nine of chapter twenty-eight of the Session Laws of Oklahoma of 1905, which provides that "in all cases not otherwise especially provided for by law, either party may appeal from the final judgment of the justice of the peace to the probate court of the county where the judgment was rendered," etc., an appeal may be taken from a judgment of a justice of the peace to the probate court only when the judgment is by confession or where there has been a jury trial and neither party claimed more than twenty dollars in his bill of particulars, as all other appeals were already provided for, in that the statutes in force at the time the section above quoted was enacted required that appeals, other than those named herein, be taken from the justice's court to the district court.

(Syllabus by the Court.)

Error from the Probate Court of Oklahoma County; before Wm.

P. Harper, Probate Judge.

Reversed and remanded.

John H. Wright, for plaintiff in error.

Crockett & Johnson, for defendant in error.

Opinion of the court by

BURWELL, J.: This action was originally commenced in the justice's court by the appellant against the appellee on an open

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account, and judgment rendered in favor of the appellant, the Canadian Coal Company, from which judgment the appellee, G. C. Eldridge, appealed to the probate court. When the case reached the probate court, the appellant, the Canadian Coal Company, appeared specially and moved the court to dismiss the appeal for the reason that the probate court had no appellate jurisdiction in actions of that kind, but that such appeals, under the law, should be taken to the district court. This same objection was made when the case was called for trial. Both motions were denied by the probate court, and judgment rendered for the defendant below, G. C. Eldridge, and the Canadian Coal Company prosecutes its appeal to this court.

The appellee relies upon the provisions of section 1 of article 9 of chapter 28, p. 331, of the Session Laws of Oklahoma of 1905, which read as follows:

“In all cases not otherwise especially provided for by law, either party may appeal from the final judgment of the justice of the peace to the probate court of the county where the judgment was rendered.”

It was said by this court in the case of *Loewen v. Myers*, 88 Pac. 1046 (not officially reported), that the only cases which, under the statute, could be appealed from a justice's court to a probate court are judgments by confession, and judgments in cases wherein neither party claims more than twenty dollars, and a jury trial has been had, as appeals in all other cases had been provided for, and that statute was only intended to provide for appeals not already provided for. The probate court had no jurisdiction of the case, as the appeal should have been taken to the district court, instead of to the probate court, and the appellant's motion to dismiss the appeal should have been sustained.

The judgment of the probate court is hereby reversed, and the case remanded to that court, with direction that it dismiss the appeal taken to it, and that the papers and cause be by it remanded to the justice's court, with direction to carry said orig-

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inal judgment into execution. All costs except those in the justice's court taxed to appellee.

Irwin, J., absent; all the other Justices concurring.

A. J. DUNLAP v. F. H. STANNARD, *doing business as* F. H. STANNARD & Co.

(Filed September 5, 1907.)

(91 Pac. 845.)

1. **APPEAL—Review—Evidence—Findings Not Disturbed, When.** Whether a contract of guaranty has been materially changed or altered is a question of fact for the court or jury, and the finding thereon will not be disturbed on appeal, where it is reasonably sustained by the evidence.
2. **INTEREST—Guaranty—Limitation—Judgment to Conform.** Where a contract of guaranty limits the amount of the indebtedness to be paid, and provides that it shall be without interest, it is error to include interest before judgment in the assessment of the amount of recovery.

(Syllabus by the Court.)

Error from the District Court of Kiowa County; before J. L. Pancoast, Trial Judge.

Modified and affirmed.

Keys, Rummons & Cline, for plaintiff in error.

Tolbert, Berry & Hays, for defendant in error.

Opinion of the court by

HAINER, J.: This is an action brought by F. H. Stannard, doing business under the firm name of F. H. Stannard & Co., against Jones Bros. & Co. and A. J. Dunlap to recover the sum of \$1,450.00, together with interest, on a verified account and a written contract of guaranty executed by A. J. Dunlap. A jury having been waived, the cause was tried to the court, and judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$1,717.29. From this judgment the defendant A. J. Dunlap appeals.

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The written instrument of guaranty upon which the plaintiff in error was held liable is as follows:

"November 6, 1902. I hereby guarantee that the firm of Jones Brothers & Company, of Hobart, O. T., will pay in cash to F. H. Stannard & Co., of Ottawa, Kansas, a sum not to exceed one thousand four hundred and fifty dollars, without interest. One-half to be paid December 1, 1902, and one-half April 1, 1903. The consideration for said sum of money being nursery stock of the value wholesale of above mentioned amount. To be shipped to said Jones Brothers & Company, at Hobart, O. T., as per contract. This guarantee to take the place of a similar one, dated October, 1902, and supposed to be lost in the mails.

"A. J. DUNLAP."

It is contended by the plaintiff in error that the contract between Stannard & Co., and Jones Bros. & Co. was materially changed or altered, and that thereby Dunlap was relieved from liability. Whether the contract of sale was materially altered or changed was a question of fact that was submitted to the court, and its finding, if reasonably sustained by the evidence, will not be disturbed by this court. We think the evidence fully sustains the finding of the trial court upon this point, and no other reasonable conclusion could have been reached by the court upon the evidence submitted.

It is contended by the plaintiff in error that the court committed error in assessing the amount of the plaintiff's recovery. It appears that the court included in its judgment interest at the rate of seven per cent. per annum from the time of the maturity of the obligations. The contract of guaranty expressly provided that the plaintiff in error should not be liable in a sum exceeding fourteen hundred and fifty dollars, without interest. Manifestly, when the defendant in error accepted the contract of guaranty, he accepted it subject to all the terms, conditions, and limitations contained in the instrument, and the plaintiff in error could not be held for a greater sum. It follows that the court erred in including interest in the judgment against the plaintiff in error, and to that extent the judgment of the court below is hereby modified.

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It is also contended by the plaintiff in error that, if he is liable at all on his contract of guaranty, then he is entitled to a credit of the sum of \$342.87. It appears that at the time of the purchase of the nursery stock by Jones Brothers & Co. the bill amounted to the sum of \$1,792.87, on which amount Jones Brothers & Co., at the time, paid in cash the sum of \$342.87, thus reducing the amount of the bill to \$1,450.00, the amount mentioned in the contract of guaranty. Plaintiff in error contends that he only guaranteed the payment of the sum of \$1,450.00, and that on that amount he should have credit for the said sum of \$342.87. There is no merit in this contention. The plaintiff in error expressly obligated himself to pay the sum of \$1,450.00, one-half of which was to be paid on December 1, 1902, and the other half on April 1, 1903. There was no limitation in the contract of guaranty upon the amount of nursery stock to be purchased by Jones Brothers & Company, but only a limitation upon the amount to be guaranteed by Dunlap, which was the sum of fourteen hundred and fifty dollars, payable one-half on December 1, 1902, and the other half on April 1, 1903. Hence the plaintiff in error is liable for the sum of \$1,450.00, the amount of credit extended by Stannard & Company to Jones Brothers & Company at the time of the purchase of the stock, and for which the written guaranty of the plaintiff in error was given, together with interest at the rate of seven per cent. per annum from the date of the rendition of the judgment until the same is paid. Nor does the fact of the payment of the said sum of \$342.87 by Jones & Company upon receipt of the shipment of the stock in any manner change or alter the terms of the contract of guaranty.

We find no other error in the record, and the judgment of the court below, as modified, is affirmed; costs of this appeal taxed to the defendants in error.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

School District No. 57 *et al.* v. W. P. Eager.

SCHOOL DISTRICT NO. 57, OF LOGAN COUNTY, OKLAHOMA TERRITORY, AND JOHN HARMON, *Director*, E. E. BRUCH, *Clerk*, AND OTTO BURST, *Treasurer of SAID SCHOOL DISTRICT*, v. W. P. EAGER.

(Filed September 5, 1907.)

(91 Pac. 847.)

1. **BILLS AND NOTES—Bank Check—Time for Presentment.** The holder of a bank check is entitled to a reasonable time in which to present it for payment; and, where the holder of a check lives in the same place that the bank on which the check is drawn is located, he has during the banking hours of the next day after receiving it in which to present it for payment.
2. **SAME—Mistake in Signature—Case.** It is the duty of one, when signing a check, to see to it that he signs it properly; and where a treasurer of a school district, in paying a debt of the district, delivers a check signed in his individual name, and the bank refuses to cash it, because the maker of the check had no funds on deposit in the bank, and several days afterwards the check was changed by the maker, by adding his official character, as treasurer of the school district, to his signature, and before the close of the banking hours of the second day after the check was corrected, the bank on which it was drawn failed (the next day after the correction of the check being Sunday), the loss will fall upon the maker of the check, which in this case was the district.

(Syllabus by the Court.)

Error from the Probate Court of Logan County; before J. C. Strang, Trial Judge.

Affirmed.

Devereux & Hildreth, for plaintiffs in error.

Cotteral & Hornor, for defendant in error.

Opinion of the court by

BURWELL, J.: The appellant school district owed W. P. Eager two hundred forty-eight dollars and seventy-two cents, as evidenced by certain school district warrants. On March 8, 1904, the treasurer of the district gave to Mr. Eager a check for these warrants, and on March 12, 1904, he discovered that he had written the check for some five dollars too much money, and on that

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day he took up the original check, which was destroyed at the time, and issued in lieu thereof another check for the correct amount. This check, like the other one, was drawn on the Guthrie National Bank, but was signed by the treasurer in his individual name. Mr. Eager presented this check for payment, but payment was refused, because the treasurer of the district, Mr. M. L. Scovill, signed the check in his individual name instead of signing it as treasurer of the school district. The account with the bank was in the name of M. L. Scovill, as treasurer of the school district, and he had no individual account with the bank. On April 2, 1904, the check was corrected by Mr. Scovill, by affixing to the check his official character, and on April 4, 1904, the bank failed before the close of banking hours. April 3rd. was Sunday.

The contention is that the appellee, W. P. Eager, was guilty of laches, and therefore should suffer the loss occasioned by the failure of the bank. It was the duty of the treasurer of the school district, when delivering the check, to see that it was in form and properly signed, and for his negligence in failing to attach to his signature his official character the appellee is not chargeable. The appellee never received a check against the deposit of the school district until April 2, 1904. The check before that time was drawn against an account of M. L. Scovill, but who, in fact, had no account there. The appellee, under the record, was not guilty of laches in presenting the check of the treasurer of the school district after receiving the same duly signed. Wilson's Rev. & Ann. Stat. of Okla. provide:

Section 3703: "A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest."

Section 3704: "A check is subject to all the provisions of this chapter concerning bills of exchange, except that, first, the drawer and endorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby."

Section 3665: "When a bill of exchange is payable at a specified time after sight, the drawer and endorser are exonerated if it is not presented for acceptance within ten days after the time

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which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused."

Section 3680: "If a bill of exchange, payable at sight, or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such payment, the drawer and endorsers are exonerated, unless such presentment is excused."

It will be observed that, on a bill of exchange payable on sight or demand, the payee has ten days in which to present it for payment. The appellee insists that the law also gives to the holder of a check ten days in which to present it for payment. We are not willing to give the language of the statute the interpretation contended for. The legislature have said that the drawers or endorsers of a check are exonerated by delay in presentment only to the extent of injury occasioned thereby; and, with this and certain other exceptions, a check is subject to all of the provisions of the code concerning bills of exchange. Checks as a rule are used in paying obligations that are due, and take the place of the cash itself, and, while a check is not an assignment of the fund against which it is drawn until accepted by the drawee, still the law recognizes that the funds are placed in bank for the purpose of paying checks drawn by the depositor on the bank. Hence the law requires one holding a check to use reasonable diligence in presenting it for payment. By the weight of authority, where the holder of a check is in the same place where the bank is located, it must be presented before the close of the banking hours of the bank on the day following the day of its receipt. California has the same statute as this territory regarding checks, and the supreme court of that state have adopted the rule stated herein. In the case of *Ritchie, Osgood & Co. v. Bradshaw & Co.*, 5 Cal. 228, it is said:

"The payee of a check, in presenting it for payment, in order to hold the drawer, is bound to the exercise of reasonable diligence. That reasonable diligence in the presentation of a check drawn upon a banker has, by the uniform current of authority,

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been held to have been sufficiently exercised by the presentation for payment upon the next day during the usual banking hours."

To the same effect are the following cases: *Himmelmann v. Hoteling*, 40 Cal. 111; *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139; *Holmes v. Roe* (Mich.) 28 N. W. 864, and *Tiedeman* on Commercial Paper, page 725, sec. 443. See, also, Cyc. vol. 5, page 531.

The statute expressly excepts checks from the operation of this law on bills of exchange, in that a check must be presented without delay; but, if the holder delays beyond a reasonable time for presentment, the drawer is exonerated only to the extent of his injury. The check was properly signed, as stated before, on April 2nd, and the appellee should have presented it for payment on the 3rd of April, but for the fact that that day was Sunday. Therefore he had all of the banking hours of the fourth of April in which to present it. Under the statutes of this territory, when the performance of an act falls on Sunday, it may be performed on the following Monday. The appellee was entitled to recover under the law and the facts as found by the trial court and the admissions of the parties.

The judgment of the trial court is hereby affirmed, at the cost of appellant.

Irwin, J., absent; all the other Justices concurring.

CAROLINE C. RYAN v. W. E. BROWN.

(Filed September 5, 1907.)

(91 Pac. 894.)

APPEAL—Failure to Brief Case—Rule Governing. The presumption is always in favor of the correctness of a judgment of a trial court, and, in case of an appeal therefrom, the burden is upon the appellant to affirmatively point out error, and where he fails to brief his case, as provided by the rules of this court, it may continue or dismiss the cause, or reverse or affirm the judgment.

(Syllabus by the Court.)

Opinion of the Court.

Error from the District Court of Garfield County; before J. L. Pancoast, Trial Judge.

Affirmed.

Manatt & Sturgis, for plaintiff in error.

Opinion of the court by

BURWELL, J.: This is an action for injunction commenced by the appellant in the district court of Garfield county against the appellee. Judgment was rendered denying the injunction and taxing the costs to the plaintiff below. He brings the case here on appeal, but, although the case was filed in this court on November 6, 1906, appellant has not filed any briefs with the clerk of the district court. Rule No. 6 of the rules of this court requires an appellant to serve his brief upon the appellee within forty days after his appeal is filed in this court, and at the time to file with the supreme court clerk fifteen copies of such brief; and the rule further provides that, for a failure to comply with the rule, the court may continue or dismiss the cause, or reverse or affirm the judgment.

No excuse is offered for failure on the part of the appellant to brief his case; no error has been pointed out to this court, and the presumption is that the judgment is correct.

Therefore it will be affirmed, at the cost of appellant.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

W. H. Gunn v. Territory of Oklahoma.

W. H. GUNN v. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 861.)

1. **OBSCENITY—Offense Against Public Morals—Evidence—Case.** One Bessie Patterson applied to the defendant, W. H. Gunn, at his office, for employment as an office girl. The two were in the office alone. The defendant requested the prosecutrix to submit to a physical examination in order that he might determine if she was virtuous, and upon her refusal he ran his hands under her clothes and placed them upon her lower limbs and used vile, indecent, lewd, and lascivious language to her. Held, that such acts did not constitute a violation of section 2552 of the Statutes of Oklahoma of 1893, which makes it a misdemeanor to "wilfully and wrongfully commit any act * * * which openly outrages public decency, and is injurious to public morals." The acts complained of were not open or public, and did not outrage public decency nor injure public morals, but constituted a personal injury inflicted privately.
2. **SAME.** The section of the statute under which the defendant was convicted is intended to cover only those acts for the punishment of which no other penalty is by statute provided.

(Syllabus by the Court.)

Error from the Probate Court of Oklahoma County; before Wm. P. Harper, Probate Judge.

Reversed and remanded.

W. A. Smith, for plaintiff in error.

W. O. Cromwell, Att'y Gen'l, and Don C. Smith, Ass't, for defendant in error.

Opinion of the court by

BURWELL, J.: Section 2552 of the Statutes of Oklahoma of 1893 provides:

"Every person who wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punish-

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ment is expressly prescribed therefor by this chapter, is guilty of a misdemeanor."

The indictment in this case charges "that the defendant, Dr. W. H. Gunn, did, in Oklahoma county and in the Territory of Oklahoma, on the 10th day of January, A. D., 1906, commit an act which openly outraged public decency and was injurious to public morals, in this: that, at the time and place aforesaid, the said defendant being a physician, was maintaining an office in his residence at number 316 North Walnut street, in Oklahoma City, Oklahoma Territory, and, on said day, one, Bessie Patterson, being an unmarried female of the age of seventeen years, and of previous chaste and virtuous character, through the directions of an employment agent, applied to the said defendant at his office for employment as an office girl; that said defendant was alone in his office at said time with the said Bessie Patterson; that he then and there, wilfully and wrongfully, informed said Bessie Patterson that before he could employ her as an office girl, it would be necessary for him to make a physical examination of her to see if she was a virtuous girl, and requested the said Bessie Patterson to then and there occupy his operating chair, which she refused to do. He thereupon insisted on making a physical examination of the said Bessie Patterson, and, for said purpose, undertook to, and did, run his hands under the clothes and place them upon the lower limbs of her, the said Bessie Patterson, and against her will and protest, and did, then and there, unlawfully, wilfully and wrongfully, use all kinds of vile, indecent and lewd and lascivious language, in the presence and hearing and to the said Bessie Patterson, which language is so indecent, lewd and lascivious, it is not proper to state herein, contrary to the form of the statutes in such cases made and provided, and against the the peace and dignity of the Territory of Oklahoma." Upon the trial, the jury found the defendant guilty, and the court sentenced him to one year in the county jail and to pay a fine of five hundred dollars.

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Does the indictment charge a public offense? The indictment charges the defendant with openly outraging public decency, and committing an act injurious to public morals. The facts pleaded in the indictment do not sustain the charge. If the defendant did the acts charged, he *outraged decency* and committed an act injurious to morals; but he did not *openly outrage public decency* and *commit an act injurious to public morals*. The statute is directed against acts which are committed openly and affect the public. As to whether an act is committed openly is generally a mixed question of law and fact, but it cannot be seriously contended that a doctor's private office is such a place as to give an act committed therein the character of an open act, especially when no one was present except the one against whom the act was committed. The supreme court of Indiana held, in the case of *Jennings v. State*, 16 Ind. 335, that a statute similar to the one under which the defendant in this case was prosecuted was so indefinite that it did not define any public offense, and hence no one could be convicted under it; but the court of special sessions of the first division of the city of New York (73 N. Y. Supp. 220), upheld a conviction under a statute almost identical with ours. However, the validity of the statute is not questioned by appellant, and we will not pass upon that question. By referring to cases which discuss the meaning of the words "openly" and "public", as, for instance, "open adultery" and "public nuisance", "public morals", etc., one will see that the acts charged against the defendant do not fall within the purview of the statute. That the acts charged constituted an assault there can be no doubt. The prosecution is not for that crime. The punishment in the opinion of some for that offense may be inadequate in the circumstances of this case, but we must interpret the law as it is, and not as we may wish it were. The legislature has made the law, and it is the duty of the courts to follow it as enacted.

The section of the statute under which the defendant was convicted is intended to cover only those acts for the punishment

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of which no other penalty is by statute provided. Conceding the validity of the statute under which the defendant was indicted, the acts charged constituting the crime of assault, he must be prosecuted, if at all, for that crime. To be sure, if the assault was made with the intent to commit some other crime defined in the crimes act, the defendant could be prosecuted for such crime. But the rule is that, if the acts charged constitute any specific crime defined in the statutes, one should be prosecuted for such crime, and not under a blanket statute like the section quoted above.

The judgment of the lower court is hereby reversed and remanded, with directions to the lower court to proceed in conformity with the views expressed in this opinion, and to dismiss said action.

Irwin and Garber, JJ., absent; all the other Justices concurring.

GOLDSTANDT-POWELL HAT COMPANY V. J. J. CUFF.

(Filed September 5, 1907.)

(91 Pac. 862.)

1. **SALES—Acceptance of Goods Purchased—Shipment of Goods Not Purchased—Findings of Jury Conclusive.** Where an action is brought by a wholesaler against a retail merchant for the price of goods sold and delivered, and the defense is that the goods not paid for were not the goods ordered, and that they were returned to the wholesale house within two weeks after they were received, and that they were never exposed for sale, and the evidence is conflicting, the issue of acceptance is one of mixed law and fact, which the jury must decide under proper instructions.
2. **SAME** Where a retail merchant orders goods of a certain class and quality from a wholesale dealer, and it ships a part of the goods ordered, and also other goods which were not ordered, the retailer may pay for the goods of the kind and quality ordered without making himself liable for the goods not ordered. And where he does not accept the goods not ordered but, within a reasonable time, in the light of the surrounding circumstances, returns them, he will not be liable therefor.

(Syllabus by the Court.)

Goldstandt-Powell Hat Co. v. J. J. Cuff.

*Error from the Probate Court of Pottawatomie County; before
William N. Maben, Probate Judge.*

Affirmed.

R. N. McConnell and Chambers, Taylor & Hooker, for plaintiff in error.

C. G. Pitman, for defendant in error.

Opinion of the court by

BURWELL, J.: The Goldstandt-Powell Hat Company is engaged in the wholesale business in Kansas City, Missouri, and on or about November 17, 1904, it, through its traveling salesman, sold the defendant a bill of goods consisting of hats, caps, gloves, etc. The goods were not all shipped at one time. The first shipment, amounting to about \$190.00, was received by the defendant at his place of business in Maud, Oklahoma, during the first week in December, 1904. When the defendant opened the boxes in which the goods were shipped, he found only about \$40.00 or \$50.00 worth of the goods were of the sizes and kinds of goods ordered. These he put on the shelves for sale. The remainder of the shipment he set back and never offered to the trade. On December 17, 1904, the defendant wrote to the wholesale house, stating that the goods sent to him were not what he had ordered, and requesting the house to send him the remainder of the goods as per his order given the traveling salesman. On December 19, 1904, he received the remainder of the order, and, finding that the goods sent him in that shipment were not the goods ordered, he boxed them up, as well as the other goods which he had not ordered, and returned them to the wholesale house at Kansas City; but, although it received due notice from the transportation company and the defendant, it never would receive the goods, and brought this suit for the purchase price thereof. The defendant paid for the goods not returned by him. On the trial, the jury found for the defendant.

It is contended by the appellant that, under the above state of facts, no matter whether or not the goods shipped were of the

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kind and quality ordered, the defendant was estopped from saying that he did not accept them. As to whether or not the goods shipped were of the kind and quality ordered, and were accepted by the defendant, were issues which the court submitted to the jury, which found in favor of the defendant. These findings, being supported by the evidence, are conclusive and binding upon the court.

Mr. Justice Clifford, in the case of *Garfield v. Paris*, 96 U. S. 557, commenting upon the law on this subject, said:

“‘Accept and receive’ are the words of the statute in question, but the law is well settled that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute. Questions of this kind are undoubtedly for the jury.”

And again, in the same opinion:

“Controlling authorities already referred to show that the question whether the goods or any part of the same were received and accepted by the purchaser, is one for the jury, to which list of citations many more may be given of equal weight and directness.”

See, also, *Am. & Eng. Enc. of Law* (2nd. Ed.) vol. 24, page 1088.

Nor did the defendant, by accepting and paying for the goods ordered, make himself liable for the good shipped to him which he did not order. The defendant had a right to pay for the goods ordered and return those not ordered. He could also insist upon the plaintiff delivering the remainder of the goods ordered, or waive the same.

The authorities cited by counsel for appellant regarding the interpretation of contracts for the sale of different articles of personal property at one sale, and their insistence that a vendee under such circumstances must receive all of the different articles, have no application to this case. The jury found that the arti-

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cles returned by the defendant were not ordered by him, and hence they were not included in the contract of purchase.

The judgment of the probate court of Pottawatomie county is affirmed, at the cost of appellant.

Irwin, J., absent; all the other Justices concurring.

S. O. CRUTCHER *et ux.* v. G. H. BLOCK.

(Filed September 5, 1907.)

(91 Pac. 895.)

1. **MECHANICS' LIENS.—Materialman's Lien—Government Land—Leasehold Estate.** Where one causes to be erected a building on real estate in his possession, and material furnished for such purposes is not paid for, a materialman's lien may be had under the laws of Oklahoma, even though the person for whom such building was erected is not the owner of a perfect legal title. A leasehold estate (if the building is erected within the authority conveyed by such instrument) is a sufficient title of ownership to authorize such a lien; and, in default of payment, such lien may be foreclosed and the rights of the lessee in the land or to the occupancy thereof under his lease, as well as the building, may be sold to satisfy the judgment.
2. **COURTS—Jurisdiction.** Where a court has jurisdiction over the persons to an action, by legal service or voluntary appearance, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action and power to render any rightful judgment therein.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Affirmed.

Hudson & Keys, for plaintiffs in error.

Stevens & Myers, for defendant in error.

Opinion of the court by

BURWELL, J.: The board for leasing school, public building, and college lands of Oklahoma Territory leased to one O. P. M. Butler for townsite purposes the east half of the northeast quar-

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ter of section thirty-six, township two north, of range twelve west of the Indian Meridian, in Comanche county. Butler platted the land into lots and blocks and streets and alleys, and it is known as Butler's Addition to the City of Lawton. He subleased, as he had a right to under the law and the written condition of his lease, to S. O. Crutcher a certain lot in this addition. One L. H. Robinson, under contract with S. O. Crutcher, erected a house on this lot in question, and the plaintiff below, having furnished lumber for the erection of this building, and the same having been used in the building and not paid for, filed a material man's lien for the lumber so furnished. There is no controversy about the facts. Judgment having been rendered by the court below for the plaintiff for \$271.05, Crutcher appeals to this court and asks a reversal: First, because the lot on which the house was erected is school land, and the legal title is in the government; second, that the residence in question is personal property, and therefore not subject to a mechanic or material man's lien; and, third, that the trial court did not have jurisdiction of the subject of the action.

The third contention is manifestly without merit. The court had acquired jurisdiction over the persons to the action, and the cause was the kind of a cause which could be tried in the district court alone. It was therefore the duty of the court to determine the merits of the controversy and grant or deny relief as the facts and law of the case might justify. Section 4817 of Wilson's Rev. & Ann. St. of Oklahoma 1903, provides that "any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, furnish material for the erection, alteration or repair of any building, etc. * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for said labor, material, fixtures or machinery." And section 4819, of the same statute provides that: "Any person who shall furnish any such material or perform such labor under a subcontract with the contractor,

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or as an artisan or day laborer in the employ of such subcontractor, may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the original contractor for the amount due him for such material and labor; and any artisan or day laborer in the employ of such subcontractor may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the subcontractor, for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth the amount due from the subcontractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed," etc. Now, it is insisted that, under these provisions of the statutes of Oklahoma, a lien cannot be had unless the person for whom the building is erected is the owner of the legal title to the land on which the building is located, citing in support of this position the case of *Kellogg et al. v. Littell & Smithe Mfg. Co.* (Wash.) 25 Pac. 461; *Tracy v. Rogers*, 69 Ill. 662; *Babbitt v. Condon*, 27 N. J. Law 154, and *Coddington v. Dry Dock Co.*, 31 N. J. Law, 477. We have examined all of these cases, and, with the exception of the first case just referred to, they do not support that contention. The statute of New Jersey provides that every building shall be liable for the payment of any debt contracted or owing for labor performed or materials furnished for the construction thereof, which debt shall be a lien on such building, and on the land on which it stands, including the lot or curtilage whereon the same is erected, and that, if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building shall be subject to the lien, unless it be erected by the consent in writing of the owner of the land, duly acknowledged or proved and recorded.

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It will be observed that the statute made a distinction between the owner and the tenant, or person other than the owner erecting a building. In the case of *Babbitt v. Condon*, *supra*, one Lowell Mason was the owner of the land. D. G. Mason made a contract with James Condon to build a house on this land, the consent of the owner of the land not having been obtained. A mechanic's lien was filed against the house and the land, which described James Condon as the contractor and D. G. Mason as the owner of the land. Lowell Mason, who owned the land and who furnished the money to build the house, was not a party. D. G. Mason had no interest in either the house or land. The lien was denied. The court did not hold that a lien cannot be had unless the party for whom a building is erected is the owner of the legal title to the land on which it is erected. Such a decision would have been in violation of a positive statute.

The case of *Coddington et al. v. Dry Dock Co.*, *supra*, simply holds that the person for whom a building is erected must have some interest in the land, or else no lien can attach. The law is stated in the syllabus as follows:

"In order to subject a building to the lien law, the owner of the building must have some estate in the land on which it stands; unless this is so, there can be no lien either on the land or the building."

In the case of *Tracy v. Rogers*, *supra*, the court denied the position of appellant in the following language:

"It is indispensable to a mechanic's lien that the party with whom the contract is made shall have some interest in the land upon which the building is to be erected or repaired, etc. This interest may be a fee simple, an estate for life, or it may be any estate less than a fee."

In the case under consideration the record shows that Crutcher held a lease for the real estate on which the house was erected, and it is the general rule that it is not necessary that the person for whom a building is erected should own the fee simple title, but the word "owner," as used in the statute, includes every character of title, whether legal or equitable, fee simple or leasehold.

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In the Am. & Eng. Enc. of Law., vol. 20, page 301, it is said:

"It may be stated as a general rule that a mechanic's lien may attach to and can be supported by an estate in fee, or of an estate or interest less than a fee, such as an estate for life or years, a mortgagor's right of redemption, the interest of a person in possession claiming title, or, in short, any other interest which the owner of the building or improvement may have in the lot or land on which it is situated, provided such interest be such that it can be assigned or transferred, or sold under execution, or, it has been said, can pass by mortgage."

And again on page 303 of the same book:

"It is well settled as a general rule at the present time that a mechanic's lien may attach to and be enforced against a leasehold estate for labor or materials furnished under a contract with the lessee, even though the tenancy is only from month to month, or, it has been held, though the tenant has the privilege of removing the machinery and fixtures on account of which the lien is claimed. The lien is, however, subject to all the conditions of the lease."

The authorities are collated in this book under these different headings and fully support the text as quoted above. It should not be overlooked that the mechanic's lien law was enacted for the protection of those furnishing material for or performing labor on a building, and not for the benefit of him who has the building constructed; and the right to a lien upon the legal title includes the right to a lien on a lesser interest in the land. It is true that some courts have held that there must exist some estate in the land itself, but these same courts have also recognized that wherever one is in possession of real property and has any estate therein, no matter how slight, if, under such title, he may lawfully erect a building thereon, such ownership will authorize a mechanic's or material man's lien and, under the law, that estate, whether it be the complete legal title or a lesser estate, may be sold. Such a lien, of course, would be subject to all of the conditions of the lease or conveyance under which the party held. Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes,

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and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.

The authorities holding that a mechanic's lien cannot attach to land held as a government homestead, or to the buildings or improvements placed thereon, have no application in this case. In such circumstances they are absolutely prohibited by congress; but where the government leases land for a term of years such lease must be measured by the general law applicable to such instruments, unless exceptions affirmatively are made by the law itself. The lease of the appellant expressly authorizes the removal of the building placed on the land under the lease. Neither the government nor the territory can in any way be affected to their detriment by the enforcement of this lien. As to whether or not a lien might have been had against a building alone under the law in force when the building was erected, where the party for whom it was erected had no interest in the land, it is not necessary to determine, as that point is not involved. However, the legislature, since this cause of action accrued, by section 1 of article 1 of chapter 28 of the Session Laws of 1903, limited the lien to the building and improvements alone, when erected on land that is leased and unimproved. This statute is in some respects a limitation on the general law, and not an enlargement of its provisions, as contended by appellant.

Under the great weight of the adjudicated cases, this judgment should be affirmed, and it is so ordered. Costs taxed to the appellant.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Alton-Dawson Merc. Co. v. J. A. Staten.

ALTON-DAWSON MERCANTILE COMPANY, *a Corporation*, v. JAMES
M. STATEN *et ux.*

(Filed September 5, 1907.)

(91 Pac. 892.)

1. **APPEAL—Review—Harmless Errors.** Although a petition fails to state a cause of action for affirmative relief in the first instance, still, where the defendant files an answer and cross-petition and the facts pleaded in the petition constitute a defense to the cross-petition, and the parties go to trial on such pleadings, and the court, on the merits, finds against the cross-petitioner, mere irregularities will be ignored, and only those errors considered which may have affected the substantial rights of the parties.
2. **MORTGAGES—Foreclosure—Defenses—Fraud and Want of Consideration.** Where a mortgage on real estate is executed without consideration, and by reason of fraudulent representations made by the mortgagee to the mortgagors, such fraud and want of consideration may be shown at any time by the mortgagors in an action by the mortgagee to foreclose.
3. **APPEAL—Review—Sufficiency of Evidence.** Where a judgment is reasonably supported by the evidence, it will not be disturbed on appeal to this court on the ground that it is against the weight of the evidence.

(Syllabus by the Court.)

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Affirmed.

Shartel, Keaton & Wells, and *H. A. Noah*, for plaintiff in error.

Snoddy & Son, for defendants in error.

Opinion of the court by

BURWELL, J.: John W. Ashcroft and James M. Staten were partners in the mercantile business at Aline, Woods county, Oklahoma. The firm's creditors were pressing them for payment, but the partners were unable to raise the money to meet their obligations. They were indebted at the time to the Alton-Dawson Mer-

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cantile Company in the sum of fifteen hundred dollars. James M. Staten and Cora Staten, his wife, on January 9, 1902, executed to the appellant two notes for this debt as follows: One note for eight hundred dollars, and one note for seven hundred dollars; and also executed to the appellant a mortgage to secure the payment of these notes on the northeast quarter of section four, in township twenty-three north of range eleven west, in Woods county, Oklahoma, which tract of land was the homestead of the mortgagors. On June 16, 1903, the plaintiffs herein commenced this action in the district court of Woods county praying for a cancellation of the mortgage. The defendant filed an answer and cross-petition, praying for a foreclosure of the mortgage in question. Judgment was rendered for the plaintiffs, and the defendant appeals to this court.

The plaintiffs alleged in their petition, and offered evidence tending to prove, that the agent of the Alton-Dawson Mercantile Company, one C. J. Tuohy, promised the members of the firm of Ashcroft-Staten Mercantile Co. that, if they would give his firm security for its claim, it and another firm (which was also given security under a similar promise) would protect them against bankruptcy and their other creditors and enable them to continue in business, which they wholly failed to do, and, as a result of such failure, the firm of Ashcroft-Staten Mercantile Company, although their assets were considerably in excess of their liabilities, were compelled to go through the bankruptcy court and their business sacrificed. The case was tried to the court and jury on special interrogatories. No general verdict was rendered. The jury found that C. J. Tuohy, the agent of the Alton-Dawson Mercantile Co., induced the plaintiffs to execute the mortgage in question by falsely and fraudulently representing to the plaintiffs that, if they would execute the notes and mortgage described above, his company would protect the firm of Ashcroft-Staten Mercantile Co. against its other creditors; that Tuohy stated to the mortgagors that if it was necessary his firm would purchase the claims of cer-

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tain other creditors who were threatening to bring bankruptcy proceedings against the Ashcroft-Staten Mercantile Co.; that these representations were made by Tuohy for the purpose of inducing the mortgagors to execute the mortgage, but without any intention of keeping such promises; that these promises never were fulfilled in whole or in part by the Alton-Dawson Mercantile Co., and that the representations by Tuohy were the inducement which caused the plaintiffs to execute the notes and mortgage.

A number of questions are argued by counsel on the respective sides; but, while we have considered them all, we have discussed only such of them as we deem necessary to a fair determination of this case.

First, it is insisted that the petition of the plaintiffs below failed to state a cause of action, and that the court erred in overruling the demurrer thereto. In our opinion this point is immaterial. Even if equity will not cancel a mortgage simply because it was obtained through fraud and constitutes a cloud upon the title to real estate (which point we do not here decide), there is a remedy pointed out in the statute where the mortgagor is in possession, as in this case. By section 4787 of Wilson's Ann. Stat. of Oklahoma it is provided:

"An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein adverse to him, for the purpose of determining such adverse estate or interest."

Although the petition failed to state a cause of action for cancellation, as contended by appellee, it does not necessarily follow that the judgment of the court is erroneous. The defendant's cross-petition prayed for a foreclosure of the mortgage, and the evidence offered in behalf of the petitioners might have been introduced as a defense to the foreclosure, and the facts pleaded in the petition might have been pleaded in an answer as a defense. Therefore the error, if any were committed, related to mere matters of procedure, which have not in the least affected the substantial rights of the parties. Such irregularities will be

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ignored by this court. *Willoughby, Rec. v. Ball*, 18 Okla. 535, 90 Pac. 1017. And, again, if the defendant had commenced the action to foreclose its mortgage, the court could have entered a judgment cancelling the mortgage, if it denied foreclosure. *First National Bank of Wellington v. Stewart* (Kan) 54 Pac. 16.

Another question urged by the appellant is that the appellees delayed an unreasonable time before commencing the action to cancel the mortgage; that, to rescind a contract on the ground of fraud, one must act promptly. We have just held that the petition did not state a cause of action for cancellation, and it is only because the appellant asked for a foreclosure of the mortgage that we consider the merits of the case at all. The statute of limitation has not run as against the mortgage, nor were the mortgagors precluded from urging any defense they might have against the same. Both parties litigated their rights as fully as they could have done if the answer and cross-petition had been the petition, and the petition of the mortgagors the answer thereto. The real issues were presented by the pleadings, although informally, and the merits of the controversy decided by the court; and the time has come when courts should adopt rules that will attain the ends of justice, rather than build up technical theories which defeat or unreasonably delay litigants of their rights. We do not wish to be understood as in any way endorsing the theory that litigants should be bound by the theory on which a case is tried, rather than the pleadings. The pleadings are the foundation of a lawsuit. From them courts must determine the issues involved; but in the case before us the irregularity, if any, did not even amount to a reversal of the order of proof, for, the execution of the mortgage being admitted, the burden was on the mortgagors to show some state of facts that would defeat foreclosure.

The trial court found against the mortgagee. But we are not inclined to decide this case on the ground alone that the notes and mortgage were obtained by fraud. It is true that the trial court found in effect that they were obtained by fraud and false

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representations, but there is one other feature to be considered, and that is, the land embraced in the mortgage was the homestead of the mortgagors. It was not liable for the debts of the firm. It was exempt property. The consideration for executing the mortgage, at least as far as Mrs. Staten was concerned, was the fulfillment of the promises made by Tuohy to the mortgagors and the firm, to the effect that the mortgagee would, if necessary, purchase the claims of certain creditors and aid them to continue in business. The trial court also found that these promises influenced Mr. Staten to execute the mortgage. The defendant (appellant) having wholly failed to keep those promises or any of them, there was no consideration for the mortgage as far as Mrs. Staten was concerned, and failure of consideration can be urged at any time against the original mortgagee. There is sufficient evidence to support the findings of the trial court, and, those findings having determined the issues of fact against the appellant, we are bound thereby. The appellant received the same dividend in the bankrupt proceedings as was paid to the other creditors of the Ashcroft-Staten Mercantile Co.; but, as to whether or not the receiving of such dividends estopped it from foreclosing this mortgage it is unnecessary to decide.

No valid reason having been urged why the judgment should be reversed, the same will be affirmed at the cost of appellant.

Pancoast, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Woods County Bank v. Bensing.

WOODS COUNTY BANK, *a Corporation*, v. H. C. BENSING.

(Filed September 5, 1907.)

(91 Pac. 842.)

WRIT OF ERROR—Review—Failure to Present Objections in Trial Court. This court will not reverse, vacate, or modify a judgment which is supported by competent evidence, nor consider in connection with error based upon such grounds, questions of erroneous procedure which were not presented to the consideration of the trial court in the motion for new trial.

(Syllabus by the Court.)

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Affirmed.

H. A. Noah, for plaintiff in error.*Snoddy & Son*, for defendant in error.

Opinion of the court by

GILLETTE, J.: This action was commenced in the district court of Woods county, Oklahoma, by the defendant in error filing therein his petition as plaintiff against the plaintiff in error, Woods County Bank, a corporation, in which he prayed judgment against the plaintiff in error in the sum of \$675 and interest from January 1, 1902, upon an account for money deposited, in the sum of \$3,747.00. To which petition the defendant answered by a general denial. The case was tried to a jury on the 14th of February, 1905, resulting in a verdict for defendant in error in the sum of \$660.11, which is confessed to be a sum in excess of the plaintiff's right of recovery in the amount of one per cent. interest, the jury having computed the interest at 6 per cent. when 7 per cent. only were allowable, and the defendant in error consents to remit \$15.00 of such judgment, being a sum in excess of the one per cent. interest illegally computed and allowed by the jury. Special questions of fact were by the plaintiff in error submitted

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to the consideration of the jury to be answered with their general verdict, as follows: "(1) Was \$150 check (Exhibit C) signed by plaintiff? A. No. (2) Was \$50 check (Exhibit B) signed by plaintiff? A. No. (3) Was check \$332.28 (Exhibit N) signed by plaintiff? A. No. (4) Was plaintiff's account with defendant equally balanced December 23, 1901, with no balance due either party? A. No. (5) How much money did plaintiff pay into the bank altogether? A. \$4,422.80. (6) How much money did plaintiff draw out of the bank altogether? A. \$3,890.42." A motion for a new trial was filed in due time by plaintiff in error, which was afterwards considered by the court and overruled; seven grounds being stated in the motion, only one of which is argued in the brief of the plaintiff in error, to-wit, the fourth ground, which is that the verdict is not sustained by sufficient evidence.

Counsel for plaintiff in error in their brief say: "The rule is familiar that the finding of a jury will not be disturbed if there is any competent evidence to support it. In spite of this, other circumstances may be taken into account in reaching a conclusion." That there was evidence to support the verdict there can be no question. The case turned upon the validity of three checks, one for \$50.00, one for \$150, and one for \$332.28. These checks were each drawn in favor of the bank; the name of defendant in error being signed to each of them. The defendant in error upon the witness stand denied ever having executed the same, denied ever having seen the last one until upon the trial of the case, and affirmed that the \$150 check given, as claimed by the officers of the bank, for the satisfaction of a promissory note, was not so given, because in fact he had satisfied that note in cash, which he paid to the president of the bank some months before the date of the check, and that when he paid it the president tore it up and put the fragments in the stove. The testimony of the officers of the bank was square at right angles with this testimony of the defendant in error, but the jury gave credence to his testi-

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mony, and the trial court, having seen the witnesses and having heard all the testimony adduced, overruled the motion for a new trial. There is therefore nothing left for this court to determine, unless we pass upon the disputed question of fact, and in doing so usurp the functions of a trial court and jury, which would be the violation of a rule so often stated that it is not necessary here to repeat.

In presenting this matter, the plaintiff in error complains of the conduct of opposing counsel in the cross-examination of the cashier of the bank. The misconduct of counsel is not made a ground for setting aside the verdict in the motion for a new trial, but the consideration of it is asked in connection with the consideration of other grounds referred to. In the presentation of a case to this court by case-made, it is a well settled rule that grounds for a new trial will not be considered in this court which were not, on the motion for new trial, presented for the consideration of the court below. It appears from the record that questions asked by the opposing counsel, which are alleged to be erroneous and prejudicial because of the insinuation of the existence of irrelevant facts, was objected to when pronounced by counsel, which objection was by the court sustained, and the court at the time instructed the jury not to consider it. Where, as in this case, there is evidence which unquestionably supports the verdict, this court cannot conclusively determine that an erroneous question propounded to the jury, which was objected to at the time and objection sustained, was nevertheless so prejudicial as to justify the reversal of a judgment supported by competent evidence, and especially so since such alleged error was not presented to the trial court in the motion for a new trial.

The judgment of the trial court should be credited with \$15.00, the rebate thereon tendered by the defendant in error, on account of the erroneous computation of interest, and when so credited the judgment of the court below will be affirmed.

Pancoast, J., who presided in the court below, not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

Mode Howell v. Blesh & Reed.

MODE HOWELL v. A. L. BLESCH AND HORACE REED, *Partners Engaged in the Practice of Medicine and Surgery under the Firm Name and Style of BLESCH & REED.*

(Filed September 5, 1907.)

(91 Pac. 893.)

1. **APPEAL—Review—Sufficiency of Evidence.** Where the evidence reasonably supports the verdict, the finding of fact will not be disturbed by this court.
2. **SAME—Harmless Error.** Errors committed by a trial court which do not affect the substantial rights of the party against whom it was committed will be ignored on appeal.
3. **HUSBAND AND WIFE—Presumption—Agency.** Where a wife requests medical treatment for an infant, it will be presumed, in the absence of proof, that she is acting as the agent of her husband; but such presumption may be overcome by evidence.
4. **PARENT AND CHILD—Parent's Liability for Medical Expenses.** A father is liable for medical or surgical services rendered his child at the request of his duly authorized agent; also, for hospital service received under similar circumstances.

(Syllabus by the Court.)

Error from the District Court of Payne County; before Bayard T. Hainer, Trial Judge.

Affirmed.

Lowry & Lowry, for plaintiff in error.

Chas. E. Bush and F. C. Hunt, for defendants in error.

Opinion of the court by

BURWELL, J.: The son of the appellant, Mode Howell, received an injury to his leg, caused by being thrown from a horse. One Dr. R. W. Holbrook, a physician, was called by Mr. Howell to attend his son. The injury continued to get worse, and other physicians were called in. Finally, there being no improvement in the boy's condition, Holbrook (so he testified) advised Howell that the boy should be taken to a hospital, and that Howell told

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him in that connection that he wanted Holbrook to do all for the boy that he could, and that he wanted the leg saved, if possible. Finally, during the absence of Mr. Howell, the boy was taken to the hospital of the appellees at Guthrie, and an incision made in the leg, and the blood clots and pus removed therefrom. He remained in the hospital some thirteen days, receiving the care of the plaintiffs as physicians, as well as the usual hospital service. The appellant insists that he instructed Dr. Holbrook that he did not want his son taken to the hospital at Guthrie. On this point, however, the evidence is conflicting; but the appellant arrived at the hospital the next morning, and, without complaint at what had been done, he let the boy remain in the hospital twelve more days without objection, and without advising the appellees that Holbrook had no authority to put his boy in the hospital. There is also evidence to the effect that Mrs. Howell, the wife of the appellant and mother of the boy, accompanied the boy and Dr. Holbrook to Guthrie, and that she told the appellees before the operation to do what they could for the boy, and, if found necessary, to amputate his leg. The real contention of the appellant is that his boy was put in the hospital without his authority and in violation of his express directions.

We have read the record and believe that the judgment should be sustained. It is probably true that one of the instructions assumes a fact which was in controversy, viz, that the wife acted as the agent of her husband, if she authorized the operation. That she was acting as the agent of her husband was only a presumption, which might be overcome by evidence. We are satisfied, however, that the jury were not misled by this error. The appellant's own conduct after he went to the hospital and learned of the operation was sufficient to authorize the jury in finding that Dr. Holbrook and Mrs. Howell had authority to direct that the operation be performed. The issues involved were issues of fact, and there is ample evidence to sustain the verdict. Under the evidence, the boy would probably have died without the operation, and, while

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a physician cannot recover for professional services rendered in the face of objections of one who would be liable therefor, in this case the evidence, taking it altogether, is sufficient to uphold the finding that the services were rendered at the request of the appellant.

Therefore the judgment is hereby affirmed, at his costs.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

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ARKANSAS VALLEY & WESTERN RAILWAY COMPANY, *a Corporation*,
v. JAMES D. WITT.

(Filed September 5, 1907.)

(91 Pac. 897.)

1. **APPEAL—Exceptions—General Exception Insufficient, When.** A general exception to a refusal to submit to the jury a number of special interrogatories is insufficient if any one of them be improper.
2. **SAME—Excessive Verdict—Grounds for Setting Aside.** The verdict of a jury should not be set aside on the ground that it is excessive, unless it clearly appears that the jury have committed some gross and palpable error or have acted under some improper bias, influence, or prejudice, or have mistaken the rules of law stating the measure of damages.
3. **EMINENT DOMAIN—Damages—Scope of Evidence.** In determining the damages to private property caused by the exercise of the right of eminent domain for a right of way for railroad purposes, testimony showing the excavations, embankments, and obstructions to the natural flow of surface water necessarily caused by the construction of the road is properly admitted for the purpose of showing in what way and to what extent the remaining portion of the uncondemned tract has been damaged by reason of the construction of the road.
4. **SAME.** Under the statutes of Oklahoma, damages in condemnation proceedings for railroad right of way purposes are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by the appropriation of his land and by reason of such railroad.

(Syllabus by the Court.)

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*Error from the District Court of Pawnee County; before Bayard
T. Hainer, Trial Judge.*

Affirmed.

Biddison & Eagleton, for plaintiff in error.

Wrightsmen & Diggs, for defendant in error.

Opinion of the court by

GARBER, J.: Plaintiff in error is a railway corporation, and condemned for its right of way across defendant in error's land a strip containing 6.51 acres. The condemnation proceedings were in conformity with the requirements of the law, and the defendant in error properly appealed from the award made by the commissioners to the district court, where a trial by jury was had and a verdict returned in favor of the defendant in the sum of \$1,450.00, and, judgment being rendered thereon for that amount, plaintiff appeals to this court, and asks for a reversal of this case upon the ground that the judgment is excessive. The questions involved in the trial of the case were: First, the reasonable market value of the land taken for right of way purposes; and, second, the injury or damage done to the remaining portions of the land by reason of the construction of the railroad and the appropriation of the tract.

An examination of the record discloses that numerous witnesses for the defendant testified that the reasonable market value of the farm immediately prior to the construction of the right of way across the land was from \$4,000.00 to \$4,500.00, and that the reasonable market value immediately thereafter was from \$2,000.00 to \$2,500.00, from which we conclude that the lowest estimated damage by defendant's witnesses was \$1,500.00, or \$50.00 in excess of the amount found by the jury. These witnesses were farmers living in the neighborhood and well qualified by their long experience as farmers, and by their familiarity with the location of the farm and the road, as shown by maps thereof, to estimate the damage to the land caused by the railroad. The separation of pasture, improvements, and water facilities from their con-

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venient connections, the inconvenience of crossing the railroad with farm machinery to farm separate tracts, the increased care and watchfulness necessary at all times while working in the immediate vicinity of the road with horses and farm machinery, the anxiety and uneasiness, the disturbance of that sense of safety and security to all members of the family while peacefully engaged in their different lines of production on different portions of the farm, were matters peculiarly within the knowledge of the experienced farmers who testified relative to the reasonable market value of the land for farming purposes immediately before and after the construction of the road. And these questions of fact were peculiarly within the province of the jury to determine in the light of all the evidence introduced at the trial of the case. We are not in sympathy with the growing assumption of appellate courts to set aside a verdict on the ground that it is excessive, when it has been approved by the trial court, unless it clearly appears that the verdict has been the result of prejudice or passion or grossly overestimated damages. The jurors and the trial judge, having the advantage of observing and hearing the witnesses on the stand in direct and cross-examination, receiving their information at first hand, as a rule are in a better position to determine the question of fact than the appellate court, receiving its information from the record. It clearly appearing that the evidence in this case is sufficient to support the verdict and judgment, and that the amount represents a reasonable assessment of damages sustained, this court will not set the judgment aside upon the ground that it is excessive.

The second and third assignments of error challenge the admission of testimony and the instructions of the court. Over the objections of the defendant, the trial court admitted testimony showing excavations made in securing materials for fills—in railroad parlance called “borrow-pits”—and in throwing up embankments upon the defendant’s land uncondemned; also, the admission of testimony showing the overflow of several acres of defend-

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ant's land caused by said embankments obstructing the natural flow of surface water. It is insisted that these are elements of damage which could not be considered by the jury in this action, but are separate causes of action which can not be merged in a condemnation proceeding. Plaintiff in error insists that in condemnation proceedings the true rule is "that a party exercising the right of eminent domain is liable for all such damages and only such damages as may accrue to the land owner by reason of the taking of the land, the same to be used in any way that the condemning party acquires the right to use it, and this whether the condemning party actually does so use the land or not." Numerous authorities are cited in support of plaintiff's position, based in many instances upon the statutes and constitutions of other states, which are not controlling here. In the case of *Blincoe v. C. O. & W. Ry. Co.*, 16 Okla. 286, 83 Pac. 903, Mr. Justice Gillette, in an able and exhaustive review of the authorities, many of which are cited here, in the opinion of the court, said: "From these cases it will appear that there is no general rule governing the manner in which damages to private property when taken for public use are to be measured. Such measurements must depend upon the constitutional law authorizing the taking, and consequential damages will be allowed when justified by such provisions. Is the taking and damage to personal property under the law of eminent domain within the foregoing rule applicable to real estate? If so, the exercise of this power over or upon the property of a citizen should carry with it the right of the citizen to recover all the damages he has suffered by reason of its exercise whether to his real or personal property." The damages for which a land owner may recover in condemnation proceedings, as expressed by statute, are not limited, as contended by plaintiff, to damages accruing from the mere taking of the land, but include the damages sustained by reason of the appropriation of the land, and in determining such damages it is proper to consider the injury caused by reason of the railroad. The statute under which

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these condemnation proceedings were had reads as follows: "The commissioners shall be duly sworn to perform their duties impartially and justly and they shall inspect said real property and consider the *injury which such owner may sustain by reason of such railroad*, and they shall assess the *damages which said owner will sustain by such appropriation of his land.*"

In *Blincoe v. C. O. & W. Ry. Co. supra*, condemnation proceedings were instituted condemning a strip of land across certain lots in the city of Guthrie which had been used for the purpose of a lumber yard. The proceedings necessitated the removal of the lumber, and upon the trial in the district court evidence was offered to show the necessary expenses incurred thereby. The objection to the introduction of such evidence being sustained, exceptions were duly saved, and the ruling of the court and the instruction embodying that view of the law were presented on appeal to the supreme court. Passing upon those questions presented, Mr. Justice Gillette, in speaking for the court, said: "That the owner by reason of such railroad has been put to the expense of removing the stock of lumber then on hand, is not disputed, neither can it be denied that the cost of such removal was made necessary by the condemnation of the real estate and is an injury and damage to the owner to the extent of the cost of such removal. In other words, this ruling would permit the railroad to take advantage of the owner of land, and thereby compel him to bear whatever expense may be consequent upon preserving his personal property, and yet be remediless therefor. If this shall be held to be the law, then the constitutional provision, 'Nor shall private property to be taken for public use without just compensation' becomes almost as much a sword as a shield to the private citizen, for the compulsory addition to the cost of personal property of the citizen is as much a taking as the absorption of the real estate itself." It was contended there, as here, that the expenses incurred in removing the lumber were such damages as could not be recovered in condemnation proceedings, and that the defendant should be

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relegated to another action at law for the recovery thereof, but the court held: "Damages to be allowed are not limited to real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land." The admission of the testimony complained of was confined to the necessary incidentals in the construction of the road, and for the only purpose of showing in what way and to what extent, if any, they affected the reasonable market value of the remaining portion of defendant's tract of land. The fifth instruction complained of by the plaintiff clearly presents the limitations mentioned, and, in our judgment correctly stated the law of the case: "In determining the elements of damage, you should take into consideration the manner in which the railroad passes through and across the land in controversy and the manner in which it was constructed, the inconvenience to the owner, in passing through the tract, and anything that would affect the usable or salable value of the land. You are not permitted to allow any damages for injuries that the land owner sustains either to his person or his property, nor for any loss occasioned by fire. Those are remote and speculative. But you may consider those matters as affecting the usable or salable value of the land. Neither can you allow for any injury by reason of floods occasioned by the construction of the railroad, but you may take into consideration the manner in which the railroad is constructed over the land for the purpose of determining whether or not the construction of the road affects the usable or salable value of the land. And as such you have a right to take into consideration the damages that the land owner has sustained. Likewise, if any dirt was thrown outside of the right of way, or what is known as 'borrow-pits,' if any were excavated, outside of the right of way you have a right to take into consideration how that affects the usable and salable value, and allow such damage as will in your judgment compensate the land owner." Thus it will be seen that the jury were instructed to consider the testimony in relation to embankments and excavations only in so far as they

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affected the usable and salable value of defendant's land, and were especially admonished not to allow any damages for injury caused by floods occasioned by the construction of the road.

In *Grand Rapids R. R. Co. v. Cheeseboro* (Mich.) 42 N. W. 69, the court, by Mr. Justice Campbell, says:

"The damages in such a case must be such as to fully make good all that results directly or indirectly to the injury of the owner in the whole of the premises and interests affected, and not merely the strip taken"—citing a large number of cases, among which was the *C. R. I. & P. R. Co. v. Haise* (Mich.) 11 N. W. 215, in the opinion of which the said court said: "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation." And in *Judd v. Hull Dock Co.*, 92 B. 443, it was held that: "Where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business." And they say: "The following are cases where the damage done was, as in this case, distinct from the actual taking of property from the party injured"—citing a number of English cases.

In *Railway Company v. Teters*, 68 Ill. 144, the court says: "The design of the law is to fully compensate a party for all injury he may sustain by reason of the appropriation of his land to the use of the road and which shall grow out of or be occasioned by its location and use at that place."

In *Omaha Southern Ry. Co. v. Dodd* (Neb.) 58 N. W. 289, in the opinion, the court said. "The damages to which a land owner is entitled by reason of the construction of a railroad across his farm are: First, the actual value of the land taken at the time of the taking without diminution on account of any benefit or offset whatever; second, the depreciation in value of the remainder of the farm by the appropriation of a part thereof for railway purposes and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. In

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an inquiry whether and how much the part of the farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm, the purpose for which it was used, the improvements thereon and how located, the direction of the road crossing the farm, the cuts and fills made or to be made in the construction of the road, the width of the right of way, the height of embankments, the depth of ditches, the inconvenience in crossing the track from one part of the farm to the other, the liability of stock being killed, the danger from fires from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm," "Just compensation for land taken consists in making the owner good by an equivalent in money for the loss he actually sustains in the value of his property by being deprived of a portion of it. It includes not only the value of the land taken, but also the diminution in the value of that from which it is severed." *Laflin v. Chicago W. & N. R. Co.*, 33 Fed Rep. 415; *Esch v. Chicago N. & St. Pr. Co.*, 72 Wis. 229.

In *Fremont E. & N. V. R. Co. v. Meeker* (Neb.) 44 N. W. 79, the court says: "It is proper to consider, in estimating the damages for a right of way for a railway, the manner in which the road cuts the land, the excavations and embankments and the exposure of the property to particular injuries from the proximity of the road."

In this case the construction of the road was complete at the time of the trial in the district court and evidence showing the actual existing condition was not subject to the objection of being uncertain, speculative or remote, and was properly admitted by the court.

In Lewis on Eminent Domain, § 482, it is said: "If the works are built before the assessment of damages is had the damages should be assessed on the basis of the works as constructed, even if improperly constructed, for the condemnor should not be allowed to assert its own wrong." And in section 496 the learned author says: "It would be difficult to enumerate the various

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elements of damages proper to be considered when a part of a tract is taken. The shape and size of the parcel or parcels which remain, the difficulty of access of communication between the different parts, inconvenience and disfigurement caused by the taking, and interference with the drainage of the land, or with the flow of surface water, or with the water supply are recognized by all authorities as proper items to be taken into account in assessing damages. Where a railroad is laid through a farm it is proper to consider the expense in constructing necessary farm crossings, unless it is made the duty of the company to build such crossings; also, the danger to which the occupants of the farm and the stock thereon will be exposed so far as the same affects the value of the farm. Injury to grass from dirt washed from an embankment was held a proper item of damage."

In *Hayes v. Ottawa, Oswego & Fox River Valley R. R. Co.*, 54 Ill. 373, the court says, in estimating the damages and benefits to result from the construction and use of a railroad over land which has been condemned for that purpose under an act of 1852, the jury are not confined to the consideration of the state of facts as they existed at the time the land was taken, but may consider the subject in the light of the facts as they exist at the time of the trial.

In *St. Louis O. H. & R. R. v. Fowler* (Mo.) 44 S. W. 771, the supreme court of Missouri say: "The damages and benefits to the remaining land after an appropriation of a railroad right of way should be estimated according to the condition of things and the rights of the parties as they exist at the trial."

In *Wichita & E. R. R. Co. v. Kuhn*, 16 Pac. 75, the supreme court of Kansas say: "On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it by a railroad company, and where it is shown at the time of the trial that the railroad is completed across the farm, it is then competent and proper to assume that the railroad was constructed as contemplated at the time of the condemn-

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ation proceedings, and all damage that is apparent which will result to the injury of the farm, such as stopping the flow of surface water, forming stagnant pools along the side of or along the right of way, and the like, are elements of damage proper to go to the jury."

In *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 458, the court say: "Where an assessment of damages for right of way precedes the building of a railroad, the presumption is that it will be built with skill and proper precautions; but, if the road has been completed through the land at the date of the trial, the jury may consider the state of facts that existed, and from the light of the actual construction determine what the damage has been, embracing all past, present, and future damages which the location of the road may reasonably produce."

In *Walker v. Old Colony & Newport R. R.*, 103 Mass. 10, the court say: "The cuts and embankments and necessary gutters of the railroad through a tract will unavoidably modify the flow of surface water, and sometimes cause damage by keeping it back or projecting it in large quantities upon lands adjoining the road. Injury to land from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute."

The supreme court of Minnesota in *Pfleager v. Hastings R. R. Co.*, 11 N. W. 72, say. "If the construction of a railroad across a farm lessens its value by preventing the flow of surface water from one part of the farm to another, this is a proper element to be taken into consideration in fixing the amount of compensation to which the owner is entitled. The rules of law governing the rights of adjacent owners as to the flow of surface water from the land of one on to the other have no application to such a case;

In determining the damages to a farm caused by the construction of a railroad, it is proper to take into consideration every element of damage that might be reasonably anticipated before the road is built and what really does exist and is apparent after

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the road is constructed. This includes the inconvenience of crossing or raising of embankments or digging of ditches, pools of stagnant and the obstruction of surface water by throwing it into channels or damming it up."

Wichita & W. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. 75; *Weyer v. Chicago W. & N. R. Co.*, 68 Wis. 180; *Schuylkill River, East Side & R. Co. v. John J. Kersey* (Pa.) 7 L. R. A. 409.

Under our statute, it was proper to consider the injury which the owner sustained by reason of such railroad, and where the embankments and excavations were caused by reason of the construction of the road, as in this case, there certainly was no error committed by the trial court in admitting the testimony in relation thereto for the purpose of showing in what way and to what extent it affected the usable or salable value of the remaining portion of the defendant's farm. The above authorities, which might be multiplied many times based upon different statutes, it is true, show the growing tendency of the law to settle and adjust in one action all the rights of the parties thereto.

The fourth assignment of error challenges the ruling of the court in refusing to submit to the jury a number of special interrogatories upon the request of the plaintiff. The only statement in the record showing an exception to the ruling of the trial court in refusing to submit the interrogatories requested appears to be an endorsement upon the back of a paper containing the request, which reads as follows: "Refused and exceptions allowed. Bayard T. Hainer." This general exception only raises the question of whether or not all of the interrogatories were proper and should have been given. If any one of the requested interrogatories should be improper, error committed in refusing to submit the others is not properly presented by a general exception. A request for the submission of a number of questions is analogous to a request for the giving of several instructions. Each interrogatory must contain a separate and distinct inquiry of fact capable of a direct answer, and a general exception to a refusal to give a

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number of them is unavailable, unless all of them be proper. The supreme court of Kansas, in passing on a like exception taken to a number of interrogatories, in the *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856, say: "The defendant also asked the court to submit to the jury forty-five questions. The court struck out seventeen of them and submitted the others. It is now insisted that five of the questions stricken out should have been answered. Three of these questions were wholly immaterial under the instructions given to the jury and the foregoing conclusions respecting the law of the case, and the other two violated the rule of *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145; and *Mo. Pac. Ry. Co. v. Reynolds*, 31 Kan. 132, 1 Pac. 150, that the jury should only be required to answer particular questions of fact, and need not be required to elaborate details of facts under general questions." But the assignment of error concerning this matter is not founded upon an appropriate exception. It is beyond controversy that many of the rejected questions were improper. A general exception to the refusal to give the rejected list was taken. This was not sufficient. Each special interrogatory submitted to the jury must be so framed as to present distinctly a single material fact involved in the issues of the case. *R. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 84. A request for the submission of a number of questions is analogous to a request for the giving of several instructions. Each one must contain a separate and independent proposition of law, and a general exception to a refusal to give a number of them is unavailable, unless all of them are proper. *Sumner v. Blair*, 9 Kan. 521; *Bailey v. Dodge*, 28 Kan. 72; *State v. Wilgus*, 32 Kan. 126, 4 Pac. 218. All the reasons for this rule apply to the submission of particular questions of fact. A defeated party can not be permitted to search through an array of proposed questions or instructions discovered to be in the record until he finds one or two sufficient to pass muster, and then to attach them to a general exception, and thereby secure the reversal of

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a judgment upon a point which the district court has had no reasonable opportunity to consider and decide.

There being no other assignment of error, the judgment of the district court of Pawnee county will be affirmed.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

WILLIAM ANDERSON V. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 890.)

1. **APPEAL—Review—Evidence—Record.** Where the question for review depends in any wise upon the evidence, such evidence must be presented in full to the appellate court, or the question will not be considered.
2. **SAME—Motion for New Trial—Insufficient Record.** Where a motion for a new trial presents material questions of fact necessary for determination, error can not be predicated upon the overruling of said motion, where the record fails to show that it contains all the evidence introduced upon the hearing.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

Ross & Anderson, for plaintiff in error.

P. C. Simons. Att'y Gen'l, for defendant in error.

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GARBER, J.: The plaintiff in error was convicted of the crime of manslaughter in the first degree at the February, 1905, term of the district court of Comanche county, and sentenced to eight years' imprisonment in the territorial prison at Lansing, Kansas. At the September, 1905, term of the district court of said county, the same being the next term after the trial, he filed his motion for a new trial, setting up that the grand jury which returned the

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indictment against him was not drawn and empanelled as provided by law. The motion for a new trial being overruled, plaintiff in error prosecutes this appeal.

The only question raised in the motion for a new trial was the legality of the panel of the grand jury, and the only error assigned is the overruling of said motion. Section 5558 of Wilson's Revised and Annotated Statutes provides that a motion for a new trial based upon the ground that the grand jury was not properly drawn or empanelled must be filed not later than the next term after trial, and in this case the motion was filed in time. Section 5400 provides that, if a motion to set aside the indictment is based upon the ground that the grand jury was not drawn and empanelled as provided by law, a showing must be made that those facts were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause, and, under section 5557, the defendant must produce at the hearing in support of his motion affidavits of witnesses, or the same may be shown by the records of the courts, or he may take testimony in support thereof, as provided in section 5399, which provides for the compulsory attendance and testimony of witnesses to be used in support of the motion. The motion for a new trial in this case, verified by the affidavit of the defendant, presented numerous questions of fact relative to the regularity of the proceedings of the various election boards throughout the county at the general election of 1904 in signing and certifying to the lists of names of persons to serve as jurors in the several precincts. The apportionment of the number of persons to serve as jurors in the respective voting precincts by the county clerk was also challenged.

It will thus be seen that the issues of fact presented to the trial court on the hearing of the motion were: First. Were the facts relied upon to set aside the indictment known to the plaintiff in error or his counsel before the jury was sworn to try his cause? Second. Were the allegations of irregularity set out in

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the motion supported by sufficient evidence? The issues thus presented necessitated the investigation of a broad field of human activity. They would admit of the introduction of affidavits and oral and record testimony. The scope of the examination at the hearing of the motion might be much broader than the trial itself, and would certainly necessitate a full and complete record in this court of all the evidence introduced upon said hearing, before it could determine whether or not error had been committed. An examination of the record before us fails to disclose any recital that the case-made contains all or any of the evidence offered or admitted at the hearing of the motion for a new trial. The record fails to show whether or not any such evidence was offered or admitted. In fact, the only record of the proceedings relative to the hearing and overruling of the motion of which the plaintiff in error complains is set out in a journal entry which reads as follows:

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"And now at this time, November 1, 1905, this cause is called on motion of defendant for a new trial. Said motion is considered and overruled, to which defendant excepts and exception allowed. Thereupon defendant is allowed to December 1, 1905, in which to make, serve and file case-made in the supreme court."

It will thus be seen that this court is not furnished with a sufficient record of evidence to determine whether or not error was committed in overruling the motion for a new trial. On the other hand, every jurisdictional requisite for the upholding of the judgment of the court below affirmatively appears, and from that time on all intendments must be taken in favor of the regularity and validity of the judgment and proceedings in the trial court. In this case, where a conviction has been had and judgment rendered, all the trial proceedings standing unchallenged, it clearly was incumbent upon the plaintiff in error to affirmatively show the error of which he complains, and, in the absence of a record showing that evidence was considered by the trial court on the hearing

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and overruling of the motion, can it be said that he has done so? Where the question raised for review depends largely upon the evidence, as in this case, such evidence must be incorporated in a bill of exceptions or case-made for the examination of the appellate court, and, in case of failure to do so, the error complained of can not be reviewed.

Counsel for plaintiff in error contend that, inasmuch as the facts set up and sworn to in their motion for a new trial were not contradicted, they should stand as admitted, and cite *Sharpe v. U. S.*, 138 Fed. Rep. 878, which contains a statement in the opinion to that effect, based, however, upon the case of *Neal v. Delaware*, 103 U. S. 394, 26 Law Edition, 567. An examination of that case, however, will disclose that it is not an authority for the statement found in *Sharpe v. U. S.* In the case of *Neal v. Delaware* the defendant filed a petition in the trial court asking that his case be transferred to the circuit court of the United States for the district of Delaware upon the grounds that in the state court he was being deprived of the equal civil rights of citizens of the United States guaranteed to him under the constitution; and in his petition, which was duly verified by him, he set out the facts which he claimed amounted to a denial of his rights, and which consisted of the exclusion under the laws of Delaware from juries of that state of all colored persons, contrary to the provisions of the constitution of the United States. His petition to have the case removed was denied, and he then, before arraignment in the state court, moved to quash the indictment and the panel of the jury upon the same ground set out in the petition for the removal of the cause to the federal court. It was then agreed between the attorney general on behalf of the state of Delaware, and the defendant, through his counsel, with the consent of the court, that the statements and allegations of the defendant, in his petition for the removal of the indictment and its prosecution for trial to the circuit court, and their verification by his oath, should be taken and treated and given the same

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force and effect in the consideration and decision of the motion to quash the indictment and the lists and panels of grand and petit juries as if the statements and allegations were made and verified by him in a separate and distinct affidavit. The court overruled the motion, and thereupon the defendant was arraigned under the indictment, and, before he had pleaded thereto, he asked the court to be permitted to produce witnesses in support of his motion to quash the indictment, which was also denied. On page 396 of 103 U. S. the supreme court of the United States, says:

"But passing by this ruling of the court below as insufficient in itself to authorize a reversal of the judgment, we are of the opinion that the motion to quash, sustained by affidavits of the accused, which appears to have been filed in support of the motion without objections to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned, should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to, be used as evidence in the support of a motion to quash, the state could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney general. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit in consideration and decision of the motion implied, as we think, that the state was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice."

The record in this case fails to show any agreement on the part of the territory and defendant whereby the facts set out in the motion for a new trial were to be taken as true. Under the statutes of this territory it was not incumbent upon the territory to file any adverse pleadings negating the allegations set out in defendant's motion. The same could be disproved by competent evidence. In the absence of a record showing that the affidavit in support of the motion was not controverted, or that it constituted all the evidence offered at the hearing, we are unable to see wherein the

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case of *Neal v. Delaware* can be construed as an authority in support of the position taken in this case, "that inasmuch as the facts set up and sworn to in the motion for a new trial were not contradicted they should stand as admitted."

There being no other assignment of error, the judgment of the district court of Comanche county in overruling the motion for a new trial will be affirmed.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

C. E. MOORE AND A. H. PROUGH V. GEORGE N. LINN AND W. J. SPIOE.

(Filed September 5, 1907.)

(91 Pac. 910.)

1. **PUBLIC LANDS—Homestead Entry—Relinquishment—Title to Growing Crops.** Where one sows wheat on land embraced in a homestead entry under a contract that he is to have two-thirds of the crop and the entryman one-third, and before the maturity of the crop the entryman sells his improvements and growing crops to another and relinquishes his homestead entry, so that such other person may file on the land, and such other person files on the land, he acquires not only the right of possession to the land itself, but also title to all improvements and growing crops thereon.
2. **CROPS—Cropper's Contract—Rights Conferred.** A cropper's contract, whereby one agrees to cultivate the land of another and is to receive as compensation therefor a share of the crops grown, does not create the relation of landlord and tenant. Except where it is otherwise provided therein, such a contract grants possession of the land only as an incident to the work that is to be performed, and confers no general right of occupancy of and control over the land cultivated.
3. **APPEAL—Review—Evidence—Harmless Error.** Error committed by a trial court in excluding a written instrument from evidence will not justify a reversal of the judgment where secondary evidence is received in lieu thereof and it is apparent that the party offering such instrument was not prejudiced by its exclusion; the facts sought to be established thereby and proven by parol evidence not being disputed.

(Syllabus by the Court.)

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Error from the District Court of Kiowa County; before Frank E. Gillette, Trial Judge.

Reversed.

Keys, Rummons & Cline, for plaintiffs in error.

J. R. Hunter, for defendants in error.

Opinion of the court by

BURWELL, J.: One John T. Shaw, while in possession of a tract of land on which he had filed a homestead entry, which was still in force, entered into a contract with the plaintiffs below, George N. Linn and W. J. Spice, wherein they agreed to sow thirty-six acres of this land to wheat and to harvest the same, they to receive two-thirds of the wheat and Shaw was to receive one-third.

The contract was in writing, but not filed or recorded in the office of the register of deeds. It is as follows:

"Territory of Oklahoma, Kiowa County. ss:

"This agreement made and entered into this fifteenth day of October, 1902, by John T. Shaw, party of the first part, and W. J. Spice and G. N. Linn, parties of the second part, witnesseth: That parties of the second part are to prepare and sow into wheat all the plowed ground, located in a body on southeast quarter of southeast quarter of sec. 34, twp. 6 north, range 17 west I. M., making approximately 36 acres, more or less; that said second parties are to furnish the seed, cut the same when ready, and put into shock or, if headed, to put into stack, all free of expense to first party.

"That second parties are to have 2-3 (two-thirds) and first party 1-3 (one-third), said wheat to be divided either in shock, stack, or when threshed, to be agreed upon by all parties hereafter, but it is especially understood and agreed by all parties hereto that said party of first part will bear his part of expense in threshing (which is one-third), and that when second parties are ready to thresh said grain, that the first party or his authorized agent will be on hand to care for his said share of grain.

"Dated at Blackwell, O. T., October 15, 1902.

"JOHN T. SHAW, party of first part,

"W. J. SPICE, party of second part,

"GEO. N. LINN."

"Witness to signature party of second part:

"L. A. SHAW."

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The wheat was sown, and on January 31, 1903, the appellant, Moore, filed a homestead entry on the land. The appellees, Linn and Spice, when harvest time came, offered to cut and care for the wheat under the contract, but Moore refused to let them go on the place, but cut the wheat, through his employe, A. H. Prough, and Linn and Spice commenced this action to replevin the wheat, and judgment was rendered in their favor for the delivery of the wheat, or, if the property be not returned, then that they have judgment for one hundred and forty dollars and costs, taxed at seventy-three and 90-100 dollars.

The plaintiffs in this case should not have recovered. When the entryman, Shaw, relinquished back to the government, the government took the land free from any burdens of any kind. Shaw could not make a contract which would in any way prevent the government from conveying to any other person an absolute estate and full and complete possession. Linn and Spice could not acquire rights to occupy the land greater than the rights of Shaw. Under the law Shaw could voluntarily relinquish the land, or the government might cancel the entry for failure on his part to comply with the law. In either event the government would not only become reinvested with the absolute right of possession, but the legal title to the growing crop would revert to the government, because growing crops, in the absence of contract, pass with the conveyance of real estate. And it has been held that where the government sells land to one, or permits one to file a homestead entry on a piece of government land, the purchaser or entryman not only acquires the absolute right of possession, but also title to all improvements and growing crops thereon. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Rasor v. Qualls*, 4 Blackford (Ind.) 286, 30 Am. Dec. 658; *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324; *Reservation State Bank v. Holst* (S. D.) 95 N. W. 931; *Hiati v. Brooks* (Neb.) 22 N. W. 73.

As between Shaw and the plaintiffs the contract could be enforced, but it could not be enforced as against the United States after the cancellation of Shaw's entry, or as against a subsequent

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entryman. When the appellees planted the wheat they took chances on the entry of Shaw being cancelled before the harvesting of the same. If this contract can be enforced, then one may make a valid lease for a term of years, whereby he may plant the entire tract embraced in a homestead entry to fruit trees, paying therefor one-third of the fruit, and hold the same as against the United States or its grantees until the expiration of the lease, although the entryman fails to comply with the law and the entry is cancelled shortly after the lease began to run. The difference between such a case and the one under consideration is of time only, and not in principle. When Shaw's entry was cancelled, the rights of Linn and Spice in the growing crops were forfeited to the government, the same as those of Shaw.

There is one other reason why the appellees must fail to recover. The contract in question is not a lease of the land sowed to wheat. The contract nowhere provides that the possession of the land shall be in the appellees until the harvesting of the crop. The contract is simply an ordinary cropper's contract, which the courts have almost universally held does not create the relation of landlord and tenant. In volume 18 of the *Am. & Eng. Enc. of Law* (2d Ed.), page 173, it is said: "The question whether an agreement constitutes a lease or an occupancy on shares has chiefly arisen in the case of agreements relating to farming lands, whereby one party agrees to cultivate the land and is to receive as compensation therefor a share of the crops grown. Under such an agreement the relation of the parties is not that of landlord and tenant."—citing a long list of cases from Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, and other states.

As to whether or not the appellees could recover damages from Shaw, we express no opinion, but they could not recover from Moore and Prough the value thereof. As far as Prough was concerned, he was only the employe of Moore. He received no part of

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the grain, and therefore neither legally nor equitably should pay for the same.

Contracts to pay for improvements placed upon a tract of land by one entryman with another, in consideration of the former relinquishing in order that the latter might file on the same land, have been upheld; but that is not this case. Moore agreed to pay, and paid, the original entryman, Shaw, \$1,300.00 for his improvements, and the wheat in question was growing on the land at the time, and Moore had no knowledge that the appellees claimed any interest therein until he had filed his homestead entry on the land.

It is also contended that the trial court committed error in refusing to admit in evidence Moore's homestead filing receipt. We are of the opinion that the instrument should have been admitted, but the appellant suffered no injury by reason of the exclusion thereof, because the witnesses were permitted to testify fully regarding such entry, and the testimony in relation thereto was not disputed.

For the reasons stated, the judgment of the lower court is hereby reversed, and the appellees' cause of action dismissed, at their cost.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

METROPOLITAN RAILWAY COMPANY V. MRS. E. P. FONVILLE.

(Filed September 5, 1907.)

(91 Pac. 902.)

1. **STREET RAILWAYS—Traveler—Contributory Negligence.** A driver of a vehicle who suddenly turns his team to cross a street railway track without looking and listening for an approaching car, and without taking the ordinary care and precautions imperatively required of all who place themselves in a similar position of danger, is guilty of contributory negligence as a matter of law.
2. **TRIAL—Duty to Direct Verdict, When.** While questions of negligence and contributory negligence are, ordinarily, questions of

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fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the court ought to set aside a verdict returned in opposition to it, it is the duty of the court to withdraw the case from the consideration of the jury and direct a verdict.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before B. F. Burwell, Trial Judge.

Reversed and Remanded.

Shartel, Keaton & Wells, for plaintiff in error.

J. O. Davis, for defendant in error.

Opinion of the court by

HAINER, J.: This was an action for personal injuries, brought by the defendant in error, plaintiff in the court below, against the Metropolitan Railway Co., to recover damages sustained by her by reason of the alleged negligence of the defendant company. The defenses interposed by the defendant were: First, a general denial; and, second, that the plaintiff was guilty of contributory negligence. From a verdict and judgment for the plaintiff, the defendant appeals.

The testimony of the plaintiff disclosed substantially the following facts: That she resided about fourteen miles from Oklahoma City. That on the morning of April 28, 1903, she came to the city with her husband, arriving about six o'clock in the morning. That they were driving two horses to a hack. That on arriving in the city they first stopped at what is known as Whetstone's store, on the corner of First and Broadway streets. That before reaching Whetstone's store the plaintiff had gone down Broadway, on the east side of the double track for several blocks. At Whetstone's store the plaintiff and her husband stopped to deliver some vegetables which they were carrying in the hack. That when Mr. Fonville came out of the store he walked on down to what is known as Brown's store, and directed his wife to drive the team on down there. It appears that Brown's store is located on Main

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street, about the middle of the block west of Broadway; Main street being the next street south of First street, where Whetstone's store is located. It further appears that the plaintiff drove from the Whetstone store one block south along the east side of the street car tracks on Broadway. That at the corner of Main and Broadway she stopped near Laird's store, with her horses facing south. At this point she saw a car approaching from the north, and stopped and waited for this car to pass her, which it did by turning the corner at Main and Broadway, and going directly west on Main street. She testifies that she did not think of another car approaching, and did not look towards the south to see if any other car was approaching, but as soon as the car from the north passed her, or, rather, around the corner of Main and Broadway, she says that she thought she was safe, and "circled the horses around" across the track to go up Main street, and was then run into by a street car coming from the south, which car she says she did not see until it struck her. The petition alleges that the motorman could have seen her at a distance of more than five hundred feet, and all the testimony tends to show that at a distance of from three to four hundred feet she could have seen the car approaching her, had she looked to the south. The petition also alleges that the car was running at a very high rate of speed, to-wit, fifteen or twenty miles per hour, at the time of the collision, and that the defendant failed to sound any gong or give any other signal to warn the plaintiff of the approach of the car. But it appears that the plaintiff failed to offer any testimony as to the speed of the car at the time of the collision, or immediately prior thereto. Nor was there any testimony offered by the plaintiff as to the distance the car was away when it first became apparent to the motorman that the plaintiff was about to turn or "circle" her team, which was facing south on the east side of the track, around to cross the track in a westerly direction. Nor was there any testimony offered that the motorman was not at his proper station at the time of the collision. The plaintiff testi-

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fies that she did not hear the gong sounded. The evidence further shows that the plaintiff was a married woman, forty years of age, in good health, and in full possession of all her faculties. At the conclusion of the plaintiff's evidence, the defendant interposed a demurrer to the evidence on the ground that the plaintiff's testimony showed that she was guilty of contributory negligence, and that she had failed to establish a cause of action. The demurrer was overruled, and an exception noted.

The evidence on behalf of the defendant tended to show that the car that caused the accident was equipped with all the modern appliances, and was in good condition; that it had rained that morning, and that the track was in a wet and slippery condition; that the car was thirty feet long, and weighed about eight tons, and was being run on Grand avenue and Main street at the rate of from four to five miles per hour at the time the motorman first saw the team; that at this point the track was level, and entirely free from obstructions; and that going at the rate of speed mentioned it would require from thirty to forty feet at least to stop the car. It further appears from the testimony that the motorman saw the team standing on the east side of the track, about five feet west of the curb, when he was about the middle of the block; that when the motorman first saw the plaintiff with her team he had no idea that she was going to turn on the track, until he saw her start in that direction, at which time the car was about fifteen or twenty feet from the place of the accident; that the motorman did everything in his power to stop the car and avoid the collision. A number of witnesses testified on behalf of the defendant that the gong was sounded as the car was approaching from the south. At the conclusion of all the testimony the defendant requested the court to submit to the jury a peremptory instruction to find the issues in favor of the defendant and against the plaintiff, which instruction was refused, and an exception saved. After filing a motion for a new trial, which was overruled and an exception saved, the defendant brings the case here for review.

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Three errors are relied upon for a reversal of the judgment. They are: (1) That there was no evidence fairly tending to show negligence on the part of the defendant; (2) that the plaintiff's own testimony shows that she was guilty of contributory negligence; and (3) that the court erred in giving instruction number six.

It was alleged in the petition that the defendant was guilty of negligence, in this: the car was moving at a high rate of speed at the time of the collision; (2) that no gong was sounded; and (3) that the motorman saw the plaintiff in a position of danger in time to have avoided the accident, or, by the exercise of reasonable care and caution, should have seen her in such dangerous position in time to have avoided the collision. As heretofore stated, the plaintiff wholly failed to show that the car was traveling at a high rate of speed at the time of the collision or immediately prior thereto. On the other hand, the testimony of the witnesses for the defendant, as well as the physical facts, shows that the car was moving at a slow rate of speed, not to exceed five miles per hour, at the distance of from three hundred to four hundred feet from the place of collision. And on the question of whether the gong was sounded, there is little or no dispute in the testimony. The plaintiff testifies that she did not hear it, and she thinks that she would have heard it had it been sounded. On the other hand, the defendant's witnesses, who were eye-witnesses to the accident, testify positively that the gong was sounded, and that the motorman did everything in his power to prevent the collision. The above is substantially the testimony offered on behalf of the plaintiff, as well as the defendant, as we gather it from the record. Upon such a state of facts, then, what is the law?

In *Railroad Company v. Houston*, 95 U. S. 697, it was held that: "The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street-crossing does not relieve a traveler on the street from the necessity of

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taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If he chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company.” And in the course of the opinion, Mr. Justice Field, speaking for the court, said: “Negligence of the company’s employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant.”

In *Elliott v. Chicago, Milwaukee and St. Paul Railway Com-*

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pany, 150 U. S. 245, it was held that though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employes on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking, or taking any precautions for his own safety. This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking ordinary precautions imperatively required of all who place themselves in a similar position of danger. The trial court was right in holding that he was guilty of contributory negligence."

And the courts uniformly hold that the same doctrine is applicable to electric street cars as to steam railroads.

In *Everett v. Los Angeles Consol. Electric Ry. Co.*, 43 Pac. 209, the supreme court of California, in passing upon this question, said: "Nor is there any distinction, in the application of this

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doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by the defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use;"—citing numerous authorities to the effect that it is the duty of the traveler to look and listen for approaching cars when about to drive across the tracks of a street railway company, and a failure to do so is such contributory negligence as will preclude a recovery for injuries received, in case of a collision.

The same doctrine is announced by the supreme court of Colorado in *Davidson v. Denver Tramway Co.*, 35 Pac. 922.

In *Young v. Citizens' St. R. Co.*, 44 N. E. 927, the supreme court of Indiana held that: "It is the duty of one walking close to, or about to cross, a street-car track, to 'look and listen,' as in the case of like situation to a steam railroad." And in *Indianapolis St. Ry. Co. v. Marschke*, 70 N. E. 495, it was said that: "It is unnecessary to discuss the relative rights of a street car company and a traveler to the use of the street occupied by street car tracks. The simple question here involved is this: Can a person, traveling upon a street, deliberately drive or walk in front of an approaching car, without looking or taking any precautions to avoid a collision, and recover for resulting injury? This question must be answered in the negative, for the authorities so hold." And in *Indianapolis St. Ry. Co. v. Zaring*, 71 N. E. 270, it is said: "Where, in an action against a street railway company for the death of one run into by a car, it appears that he could have seen if he had looked, and heard if he had listened, the approaching car in time to have avoided the collision, the facts show contributory negligence *per se*."

In *Burns v. Metropolitan St. Ry. Co.*, 71 Pac. 244, the su-

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preme court of Kansas held: "A traveler on a city street, who is about to cross the tracks of an electric street car company, must exercise his faculties of sight and hearing, and under special circumstances must use other careful and prudent means to ascertain whether a car is approaching. The prevailing rule respecting the care required of a traveler over steam railway tracks applied to one crossing a street railway." And in *Metropolitan St. Ry. Co. v. Ryan*, 71 Pac. 267, it was held by the supreme court of Kansas that: "Where, upon the trial, plaintiff testified she alighted from an east-bound street car, and passed back of it and to the northward upon a parallel track four feet distant, on which cars traveled in an opposite direction, without looking for an approaching car, and sustained injury, and, to have looked eastward along the space between the parallel tracks after passing by the end of the standing car, an approaching car could have been seen a distance of two blocks, held error to overrule a demurrer to plaintiff's evidence."

In *Hurley v. West End St. Ry. Co.* 62 N. E. 263, the supreme court of Massachusetts held that: "Where plaintiff, in the daytime, drove across the tracks of a street railway, on which he knew electric cars were running, without looking to see whether a car was coming or not, and knew nothing of its approach until it hit the hind wheels of his wagon, or until it was a rail off, it was proper, in an action for the injuries, to rule that plaintiff was not in the exercise of due care, and take the case from the jury."

To the same effect are the following authorities: *McGee v. Consolidated St. Ry Co.* (Mich.) 60 N. W. 293; *Henderson v. Detroit Cit. St. Ry. Co.* (Mich.) 74 N. W. 525; *Doherty v. Detroit Cit. St. Ry. Co.* (Mich.) 80 N. W. 36. *Deitring v. St. Louis Transit Co.* (Mo.) 85 S. W. 140; *Riska v. Union Depot R. C.* (Mo.) 79 S. W. 445; *Markowitz v. Metro. St. Ry. Co.* (Mo.) 85 S. W. 351.

In *Hannan v. No. Jersey St. Ry. Co.* 47 Atl. 803, the supreme court of New Jersey held that: "A driver of a vehicle is guilty of contributory negligence in suddenly, and without warning, turn-

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ing his horses across a street railway track, directly in front of an approaching car."

The supreme court of Oregon has held to the same rule in the following cases: *Smith v. City & Sub. Ry. Co.* 46 Pac. 136; *Wolf v. City & Sub. Ry. Co.* 72 Pac. 329.

The same doctrine is announced by the supreme court of Wisconsin in the case of *Cawley v. La Crosse City Ry. Co.* 77 N. W. 180, where Mr. Justice Marshall, speaking for the court, said: "The theory upon which the court sent this case to the jury on the subject of contributory negligence manifestly was that, conceding the rule of law requiring plaintiff to look and listen, her testimony that she did so was sufficient to require the jury to find where the trouble lay, as if it were permitted to them to say on such evidence that she did in fact look and listen, and yet did not see or hear the car that was unquestionably in plain sight and hearing. In that there was a failure to observe the limits beyond which a jury cannot go. They cannot go beyond the boundary of reasonable probabilities in determining facts from evidence without going into the realms of conjecture or perversity. This court has often held that the rule of law that requires a person to look and listen before going upon a railway track requires him to see and hear an approaching car if it is so located as to be plainly within view and hearing, that evidence of a person so circumstanced that he looked but did not see, or listened yet did not hear the car, if believed at all, is only to establish contributory negligence by showing that he knowingly placed himself in a place of danger. *Groesbeck v. Railway Co.* 93 Wis. 505, 67 N. W. 1120; *Schneider v. Railway Co.* (Wis.) 75 N. W. 169; *Steinhofel v. Railway Co.* 92 Wis. 123, 65 N. W. 852; *Haetsch v. Railway Co.* 87 Wis. 304, 58 N. W. 293."

The doctrine is well settled by the authorities that when the evidence given at the trial, with all the inferences which the jury could justifiably draw therefrom, is insufficient to support a verdict, and that such verdict, if returned, ought to be set aside, the

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court should not submit the case to the jury, but ought to direct a verdict for the defendant.

In *Pawling v. U. S.* 4 Cranch (U. S.) 222, Chief Justice Marshall stated this rule as follows: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw." In *Pleasants v. Tants*, 22 Wall. (U. S.) 121, Mr. Justice Miller, speaking for the court, clearly and forcibly states the true doctrine as follows: "It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor. That is the business of the jury. But, conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of

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plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." And in *Bowditch v. Boston*, 101 U. S. 18, the settled doctrine of the supreme court of the United States is stated as follows: "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice. *Merchants' Bank v. State Bank* 10 Wall. 604, 637; *Improvement Company v. Munson*, 14 Wall. 442; *Pleasants v. Fant*. 22 Wall. 116."

In *Cawley v. La Crosse City Ry. Co.* 77 N. W. 181, the supreme court of Wisconsin states the rule as follows: "Candor compels us to say that in this case the learned trial court appears to have shifted a duty onto the jury which was plainly judicial, and when they failed to discharge it properly, allowed the result to stand as the law of the case. The jury did not find the fact because there was no controversy in that regard. They said that the conduct on the part of defendant was actionable negligence, and conduct on the part of plaintiff was consistent with ordinary care, when the proper application of well-settled rules of law would have led to a contrary result. The peculiar circumstances of this case move us to reiterate what has often before been said by this court, that though the rule that where there is any credible evidence which, under any reasonable view of it, will sustain a recovery, and there is opposing evidence, it is for the jury to say where the

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truth lies, should be firmly adhered to, where the evidence is clearly susceptible of only one reasonable inference, the motion for a nonsuit, or the direction of a verdict accordingly, should be granted as a matter of right, which implies a judicial duty to decide that way, and not to abrogate the judicial function and shift it onto the jury. *Finkelston v. Railway Co.* 94 Wis. 270, 68 N. W. 1005. A proper administration of justice requires that such a situation should be met, and the duty involved be discharged as contemplated by our judicial system, just as much as that the province of the jury to decide the facts from the evidence, where there is any conflict in that regard, should not be invaded by the court. The scope of judicial duty, and of that of the jury as well, is clearly marked, and a failure to maintain the integrity and inviolability of either is subversive of the system itself, and tends to throw doubt upon its efficacy to secure the highest attainable degree of justice between individuals, and to promote the ends of good government."

Tested by these decisions, we think the undisputed testimony shows that the plaintiff was guilty of such contributory negligence as would preclude her from recovering in this case, and therefore the motion to direct a verdict for the defendant should have been sustained. This is not a case, as was stated by the supreme court of the United States in *Elliott v. Chicago, Milwaukee and St. Paul Railway Company*, *supra*, in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For in the case at bar the plaintiff was in no danger. She was at a place of absolute safety on the east side of the street car track. She suddenly, as she states, "circled around" from a place of safety and drove heedlessly and carelessly over the track, without looking for an approaching car from the south, and without taking the ordinary care and precautions that she was bound to exercise under the circumstances for her own safety. Hence she was clearly guilty of contributory negligence, as a matter of law.

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The judgment of the district court is therefore reversed, and the cause remanded, with directions to award a new trial.

Burwell, J., who presided in the court below, not sitting; Irwin J., absent; all the other Justices concurring.

MORRIS BROWN V. LAURA DONNELLY.

(Filed September 5, 1907.)

(91 Pac. 859.)

1. **INJUNCTION—Dissolution at Chambers Upon Defendant's Motion—Review—Harmless Error.** A district judge at chambers (proper notice having been given of the time and place of hearing) has power to dissolve a temporary injunction, even though it was granted upon a hearing at which both parties were present. The statute of Oklahoma, which provides that where a temporary injunction is granted without notice to the defendant, he may upon notice apply to have the same dissolved, confers upon the defendant the right to be heard by the court or judge upon such motion, and is not intended to prohibit the court or judge, in the exercise of discretionary powers, from hearing such a motion where the temporary injunction was granted upon notice in the first instance. This court will not reverse an order made by the judge of a district court at chambers on account of error in admitting or excluding evidence on a motion to dissolve a temporary injunction, unless such error affects the substantial rights of the party appealing.
2. **SAME—Public Land—Contest—Power of District Court.** Where two persons are contesting in the land department over a tract of government land, and each is in possession of a portion thereof, the district court cannot, under the rules of equity jurisdiction, by mandatory injunction, take the land in the possession of one of the contestants and give it to the other.
3. **SAME—Temporary Orders—Modification.** All orders made by a district court, or a judge thereof, on a hearing for a temporary injunction or on a motion to dissolve the same, in so far as they affect the subject in controversy, are only temporary and may be modified in the final judgment, giving to the respective parties that order or judgment which the rules of equity require.
4. **SAME—Case.** Where two persons are contesting in the land department for a tract of government land, and one obtains by mandatory injunction land which was in the possession of the other, and plants the same to corn, and, before the corn is har-

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vested, the judge of the district court dissolves the temporary injunction and orders the crop divided, this court will not reverse such order dividing such crop unless, from the evidence, it can be said that the trial judge exceeded his authority. The order so dividing the crop on the motion to dissolve the hearing is not a final judgment, and the rights of the parties to the corn may be litigated on the final trial, each being accountable for that portion of the crop which he received. On the final hearing all of the issues involved in the case may be litigated, and judgment rendered declaring the rights of the respective parties in relation thereto.

(Syllabus by the Court.)

Appeal from an Order of the District Judge of Noble County dissolving Temporary Injunction; before John H. Burford,

Trial Judge.

Affirmed.

H. B. Martin, for plaintiff in error.

Dale & Bierer and W. M. Boles, for defendant in error.

Opinion of the court by

BURWELL, J.: This is an action in the nature of mandatory injunction between two homestead claimants. On the preliminary hearing the court found that the plaintiff, Morris Brown, was in possession of five acres of the northeast quarter of section twenty-two, township twenty-three north, of range one west of the Indian Meridian, in Noble County, territory of Oklahoma, and that this five acres was in substantially square form and located in the southeastern portion of the claim, adjoining the eastern boundary thereof, and immediately north of the creek; and that the plaintiff was entitled to the possession and control of the entire north eighty acres of the land, except any part which might be occupied by the residence of the defendant, and the improvements immediately surrounding the same, and about five acres which the defendant then had planted to corn. The court then made an order giving the plaintiff, Brown, possession of the north eighty acres of the quarter section, except any part thereof which might be occupied by the residence of the defendant and her improvements imme-

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diately surrounding the same. The order also provided that the plaintiff should not have possession of five acres which the defendant had planted to corn until November 1, 1899. The defendant was then enjoined from interfering with the plaintiff in the occupancy of the land, the possession of which was given him by the order of the court. The order contained other provisions regarding the use of timber, the privilege of watering stock, etc. This order was made by the court on July 22, 1899. On July 31, 1905, six years after the temporary injunction had been granted, the defendant filed a motion to dissolve the same. The motion came on for hearing before Hon. John H. Burford, chief justice, sitting at chambers as district judge at Perry, Oklahoma, in the absence from the district of the regular presiding judge. On this hearing the temporary injunction was dissolved, and it was also ordered that the defendant be placed back in possession of the land taken from her by the temporary injunction. The plaintiff appeals to this court.

The order made by the trial court, dispossessing the defendant and enjoining her from interfering with the plaintiff in his occupancy of the land so taken away from her, was in excess of its authority (*Black v. Jackson*, 177 U. S. 349), and it was just and equitable that the defendant be restored to the possession of the land which had been taken from her and given to the plaintiff. It was the duty of the judge to give back to the defendant that which the court had erroneously taken away from her in this same action. The contention of the plaintiff that the trial judge, in dissolving the temporary injunction, entered a final judgment is without merit. The only order made by the trial judge that was in any way final in its character was the order regarding the division of the growing crops. The plaintiff had raised a crop of corn on land that the court had erroneously taken from the defendant and given to him. The defendant had been deprived of the benefits of the land, and the trial judge simply said that the plaintiff should be treated as a tenant and the defendant as a land-

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lord as to such crop, the plaintiff taking two-thirds, and that he should deliver to the defendant one-third. The plaintiff cannot complain of this. The court might (and still keep within its lawful powers) have been less considerate of his interests. In 22 Cyc. p. 1001, it is said: "The dissolution of a preliminary injunction merely puts the parties in the same position in which they were prior to its issuance." And again, on page 1000 of the same book, the author says: "On dissolving an injunction, affirmative relief cannot ordinarily be granted to a defendant in the absence of a cross-bill asking it, although, where the injunction has taken property from the defendant, the order should grant restitution thereof." The trial judge followed this well-established rule as near as he possibly could under the circumstances.

It is next insisted that, the district court having granted the temporary injunction upon notice, the judge of the court could not dissolve it at chambers. In support of this contention we are cited to section nine of the organic act of the territory, which confers the judicial power of the territory upon the supreme court, district courts, and other courts, and then provides that the said supreme and district courts, and the respective judges thereof, shall and may grant writs of mandamus and habeas corpus in all cases authorized by law. Now it is said that, as the organic act confers power on the judges of the district courts to grant writs of mandamus and habeas corpus, by implication power to grant temporary injunctions and to vacate the same when granted by the court was withheld. If this section of the organic act were all of the law upon the subject there would be some justification for the position; but there are other portions of the organic act which must be considered. The supreme and district courts by this same organic act are vested with chancery as well as common law jurisdiction and authority to redress all wrongs committed against the constitution or laws of the United States or of the territory affecting persons or property. And then (section eleven of the act) part two of the law of Nebraska, entitled "Code of Civil Proce-

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ture," as far as locally applicable, was put in force in Oklahoma until after the adjournment of the first session of the legislative assembly of the territory. Attention is directed to certain provisions of these laws thus put in force. Section 252, part 2, Code of Civil Procedure of Nebraska, provides:

"The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, upon it appearing satisfactorily to the court or judge, by affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

Then section 263 provides how a temporary injunction may be dissolved:

"Section 263. If the injunction be granted without notice, the defendant, at any time before trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge allowing, dissolving or modifying an injunction shall be returned to the office of the clerk of the court in which the action is brought and recorded and obeyed, as if made by the court."

When congress put in force these two sections of the Nebraska laws, it clearly recognized the right of a judge of the district court to dissolve a temporary injunction, whether granted by the court or judge. Section 4426 of Wilson's Revised and Annotated Statutes of Oklahoma is virtually the same as section 252 of the Nebraska procedure act, and section 4437 of Wilson's Revised and Annotated Statutes of Oklahoma is exactly the same as section 263 of the Nebraska procedure act quoted above. Congress, having put these two sections of the Nebraska laws in force, thereby conferred all of the powers therein named upon the judges of the district courts of the territory, and clearly recognized the right of the territorial legislature to re-enact these or other similar laws upon the same subject. The power was clearly thereby conferred upon the judges of the courts and could not be taken away by the

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legislature. It could only change the procedure. The writs of mandamus and habeas corpus are, by reason of their peculiar character, usually named specifically in constitutions and organic law, such as the organic act of this territory, while injunctions are not necessarily named specifically, because this class of actions fall strictly within chancery jurisdiction. Nor is the judge of the court prohibited from dissolving a temporary injunction because the statute provides that, "if the injunction be granted *without notice*, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same." By this statute, if the injunction is granted without notice, the defendant is entitled, as a matter of right, to have the court or judge hear him upon the question of the dissolution of the same. The language was not intended to limit the power of the court or judge where the injunction is granted upon notice, but to require it or him to hear the defendant where it is granted without notice.

The assignment that the trial judge committed error in the admission and exclusion of evidence, even if well taken, did not prejudice the plaintiff on his hearing. The court records which were excluded appear in the case-made, and, even if they had been considered, the temporary injunction should have been dissolved. If the district court, in a former action, took from the plaintiff a part of the land in question, as contended by counsel, and gave it to the defendant, and error was committed thereby, he should have appealed from the judgment therein rendered. The defendant was in possession of the land that was restored to her by the trial judge at the commencement of this action, and as to whether she was put into possession of it originally by a just or erroneous judgment cannot be litigated in this action, and the files pertaining thereto were immaterial. The files in this case would be considered by the judge in passing upon this motion to dissolve the injunction, even though they were not formally admitted in evidence. The fact that the defendant was in default of answer, if such

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be the fact, does not help the plaintiff. His petition did not state a cause of action for mandatory injunction; hence the defendant, although she did not deny any allegation of the petition, could move to dissolve the temporary injunction.

It is not necessary to determine as to whether or not the trial judge had the authority in law to require the plaintiff to execute a supersedeas bond, in order to prevent that part of the order directing the possession of the land to be given back to the defendant from being carried into execution. The order made by the trial judge has been reviewed, and a determination reached that such order was correct. The error, if any was made, has not deprived the plaintiff of any substantial right.

We have examined the appellee's cross-assignments of error, and are of the opinion that the order made, in so far as it affects the growing crops, under all of the circumstances, should, with the other provisions thereof, be sustained. The evidence on the final hearing as to the condition of the growing crop may be more satisfactory than it appears from this record.

The order of the district judge of Noble county is affirmed, at the cost of appellant.

Burford, C. J., and Hainer, J., took no part in this court; Irwin, J., absent; all the other Justices concurring.

DROVERS' LIVE STOCK COMMISSION COMPANY V. CUSTER COUNTY
STATE BANK, CHARLES W. GOODWIN, AND OTTO A. SHUTTEE.

(Filed September 5, 1907.)

(91 Pac. 850.)

1. **ATTACHMENT—Bond to Pay Judgment—Action Thereon—Necessary Averments.** In an action on an undertaking given by the defendant in an attachment case, under section 4107 of the Statutes of Oklahoma of 1893 to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking.

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2. **REFORMATION OF INSTRUMENTS**—Equitable Relief Denied, When. Equity will not subject the property of one party to the payment of the debt of another; and a mistake will not be corrected in an equitable action, unless the plaintiff shows by his bill that without such correction it will suffer loss or injury, but even then the court will not enter a decree that will injure another in order that the plaintiff may not suffer loss.

(Syllabus by the Court.)

Error from the District Court of Custer County; before C. F. Irwin, Trial Judge.

Affirmed.

I. H. Lookabaugh, H. H. Howard and George R. Jobson, for plaintiff in error.

S. H. Reid, M. D. Libby and Fred Gillette, for defendants in error.

Opinion of the court by

BURWELL, J.: The plaintiff in error commenced suit against the Custer County State Bank, E. W. Crane and J. W. Winans, for money on an account. A writ of attachment was sued out and certain property seized thereunder. The Custer County State Bank then executed a bond under the statute, which recited the bringing of the suit, the levying of the attachment on property belonging to the Custer County State Bank, describing the property, and then the bond closed with the conditional agreement to pay any judgment that might be rendered against it. Crane and Winans were not parties to this bond. On the trial judgment was rendered in favor of the plaintiff and against E. W. Crane and J. W. Winans for \$5,654, and \$139.95 costs, but against the plaintiff and in favor of the Custer County State Bank. The plaintiff in error then commenced the present suit to reform the undertaking given by the Custer County State Bank for the release of the property, so as to bind the bank and the sureties to pay any judgment that might be rendered in the case, instead of "against it" (the bank). The petition also alleges that execution had been issued against Crane and Winans, and returned

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"no property found." The plaintiff also prays for judgment against the Custer County State Bank and the sureties on the bond for the amount of the judgment and costs against Crane and Winans. A demurrer was filed to the petition, and sustained by the court. The plaintiff elected to stand on the petition, and the court entered judgment dismissing the case, and the plaintiff has come here on appeal.

We are clearly of the opinion that the petition fails to state a cause of action. The purpose for executing a bond like the one in suit is to secure the return of the property attached, and there is no allegation in the petition to the effect that after the Custer County State Bank executed the bond in question the attached property was returned to it. Such an allegation was indispensable, and the fact that the court, after the bond was approved, ordered the attached property to be released, and the plaintiff attached a copy of such order to his petition, is not sufficient. The burden is on the pleader to show that the attached property actually was returned. The bond was executed under the terms of section 4107 of the Statutes of Oklahoma for 1893, and this statute contemplates restitution of the attached property.

In the case of *James McGonigle et al. v. William Gordon et al.*, 11 Kan. 167, the supreme court of Kansas, in passing upon the question here presented, said:

"In an action on an undertaking given by the defendant in an attachment case to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking."

It is also admitted by counsel for the appellant in their trial that the Custer County State Bank was not indebted to the plaintiff, the Drovers' Live Stock Commission Company, in any sum whatever, and it is insisted that the bank should not have been made a party to the suit. The record as presented by the plaintiff (and by the record we mean the bond) recites that the property attached was the property of the Custer County State Bank.

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and the conditions of the bond are that the bank and the sureties on the bond will pay any judgment that may be rendered "against it" (the bank); and the allegation of the petition in this case is that the property was attached as the property of Crane and Winans. This allegation is not enough to justify a reformation of the bond. The plaintiff has come into a court of equity asking for relief against a mistake; but, even though a mistake has been made, before relief will be granted it must appear that the plaintiff, without such correction, will suffer injury and be deprived of the benefits of his attachment. If the property attached actually belonged to the bank, the bond was in proper form, for its property could not be legally subjected to the payment of another's debts. If the property attached was in fact the property of Crane and Winans, the plaintiff should have so stated in its petition. That the property was attached "as the property of Crane and Winans" would not be sufficient to justify the court to reform the bond. The plaintiff should have alleged, not that it was attached as the property of Crane and Winans, but that it was duly attached in the action, and that it was the property of such defendants, and not the property of the Custer County State Bank. Equity delights in doing full and complete justice, and, if this property which was attached was (as recited in the bond) in fact the property of the Custer County State Bank, then the attaching it by the plaintiff as the property of Crane and Winans presents no equitable cause of action. The plaintiff cannot in equity complain that he has been prevented from subjecting the bank's property to the payment of the debts of Crane and Winans.

Judgment affirmed. Costs taxed to appellant.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

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CITY OF GUTHRIE V. CHANDLER MCKENNON, *Administrator of the
Estate of FRANCIS R. MCKENNON, Deceased.*

(Filed September 5, 1907.)

(91 Pac. 851.)

1. **JUDGMENT—Fraud—Vacation—Time for Application.** A judgment of a court of record, obtained and procured to be entered by reason of the fraud and deceit of the party benefited thereby, is voidable at the suit of the judgment debtor, which suit may be maintained under the provisions of section 18 of the Code (Wilson's Rev. & Ann. Stat. 1903, sec. 4216), within two years after the date of the discovery of the fraud.
2. **SAME.** The provisions of sections 562 and 569 of the Code, which limits the time in which a procedure thereunder may be instituted to reverse, vacate, or modify a judgment to two years from the date of the judgment, does not apply so as to estop the bringing of an equitable action to cancel a judgment on the ground of fraud within two years from the date of the discovery of such fraud.
3. **SAME—Pleading—Defective Petition.** In an action to set aside a judgment on the ground of fraud practiced in procuring the same, where the petition alleges and shows that judgment has been obtained upon a chose in action which the party obtaining such judgment did not at the time own, but that the same was owned and had been reduced to judgment by a third party, and where by such petition it is shown that the petition upon which the alleged fraudulent judgment was entered set out that such third party claimed some interest in the chose in action with reference to which the plaintiff was not fully advised, and prayed an order that such third party be impleaded and brought in, that the right of all the parties might be fully adjudicated, which petition was verified, such verification reciting the fact that the plaintiff was the owner of the chose, except such interest as such third party might have therein, **Held**, that such petition does not state a cause of action, because it appears therefrom that the plaintiff had notice of such facts and circumstances as would put a person of ordinary prudence upon inquiry, which inquiry would have disclosed the defense, if any, the defendant in such action might have.

(Syllabus by the Court.)

Opinion of the Court.

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Affirmed.

James Hepburn, City Att'y, and Lawrence & Huston, for plaintiff in error.

J. C. Strang and Devereux & Hildreth, for defendant in error.

Opinion of the court by

GILLETTE, J.: This action was commenced October 30, 1903, in the district court of Logan county, by filing in said court a petition setting forth facts which were relied on to support a judgment vacating and holding for naught another judgment of said court in favor of the defendant and against the plaintiff. city of Guthrie, which judgment so sought to be vacated was entered upon an agreed statement of facts, November 20, 1900, in the sum of \$1,234.86. A demurrer was filed to the petition and sustained by the court February 16, 1904. Four days later, on February 20, 1904, an amended petition was filed, against which another demurrer was lodged and sustained February 13, 1905. The case comes to this court, praying judgment reversing the order of the lower court sustaining such demurrer.

It appears from the petition filed that the judgment complained of was based upon certain items of indebtedness of the city, which were allowed, and warrants issued to John E. Ford by a commission appointed and acting under and by force of an act of the legislature of December 5, 1890, entitled, "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, and now consolidated into the city of Guthrie" (St. 1890, §553), which items of indebtedness are numbered and described, and are shown by the petition to have been the items of indebtedness considered by the court in the rendition of the judgment now complained of;

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it being alleged that John E. Ford during the lifetime of Francis R. McKennon sold said items to said McKennon, who afterwards died, and whose estate, at the suit of T. F. McKennon, administrator, recovered judgment for and on account of. The petition shows that on November 29, 1899, the Guthrie National Bank, in an action brought against the city of Guthrie, recovered judgment against the city of Guthrie upon the same items of debt that McKennon, as administrator, sued for and recovered upon November 20, 1900, a year subsequent to the judgment in favor of the bank for the same. The petition alleges: That the McKennon judgment was and is fraudulent and was fraudulently obtained, for that T. F. McKennon, at the time of bringing such suit as administrator, knew that the estate of Francis McKennon did not own such items of indebtedness. That Adelbert Hughes, city attorney of the city of Guthrie, confessed judgment against the city in favor of T. F. McKennon, administrator, relying upon the sworn statement of T. F. McKennon in the verification of plaintiff's petition and his verbal statement to the effect that Francis R. McKennon, deceased, was at the time of his death the owner and holder of such items of indebtedness, when in fact he was not so the owner of such items; but, believing the same to be true because of such representations, he entered into a written stipulation upon the filing of which the judgment complained of was entered, which, among other things, contains a stipulation as follows: "It is further stipulated that plaintiff herein is the owner and holder of the claims mentioned, set out and sued upon in this action." That when the said T. F. McKennon brought such suit against the city of Guthrie the mayor and members of the city council and the city attorney of the city of Guthrie were deceived by the sworn statement and allegations of said T. F. McKennon, in his said action against plaintiff, and by his oral and positive statements made to Adelbert Hughes, city attorney, and to others during the pendency of said action in court; and they relied upon and believed the allegations in said petition contained, and the

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oral allegations of said T. F. McKennon, and had no reasonable cause or ground to believe otherwise until long after judgment had been entered upon said items in favor of said T. F. McKennon as aforesaid. The petition of T. F. McKennon set out and stated as follows: "Plaintiff avers that the Guthrie National Bank claims some interest in a portion of said claims, the exact nature of which the plaintiff is not able to state." And in the prayer for judgment it asks that the Guthrie National Bank might be impleaded and required to set up any claim it had upon the items of indebtedness sued upon. The verification of the petition by T. F. McKennon contained the following: "That he is the *bona fide* owner and holder of the claims described in the foregoing application and motion to the best of his knowledge and belief, except such interest, if any, as the Guthrie National Bank may have or hold in a portion of the said claims." The judgment complained of, and sought to be set aside, was entered upon the agreed facts, without making the Guthrie National Bank a party or requiring it to come in and set up its interest in said claims. That at the time the judgment was rendered in favor of T. F. McKennon a stipulation was entered into by counsel for said McKennon and the city attorney for said city which in terms set forth that said action was subject to appeal to the supreme court, but that it was to be held and considered by the parties as a pending action in the district court until a cause pending in the supreme court wherein the city of Guthrie was plaintiff in error and one F. B. Lillie was defendant in error should be by the supreme court determined, and, when so determined, the determination of the supreme court should be entered in this case in all respects as though the same had been appealed to the supreme court; that is to say, if the Lillie case was affirmed by the supreme court, such affirmation should be entered and considered as an affirmation by the supreme court of the pending case, and a reversal would likewise operate as a reversal of the said action. The record shows that the case of the *City of Guthrie v. Lillie* was finally disposed of in

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the supreme court, June 10, 1902, without judgment upon the merits of the appeal. The petition averred that the plaintiff was without adequate remedy, except in equity, and prayed for judgment vacating the McKennon judgment, and for an order staying and enjoining its enforcement by the said defendant McKennon.

Two questions are now presented for the consideration of this court: First, was this action at the time of its commencement barred by the statute of limitations? and, second, does the petition state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant? On behalf of the defendant in error it is urged that the two-year statute of limitations provided for in sections 569 and 562 of Civil Code (Wilson's Rev. & Ann. St. 1903, §§4767, 4760) governs the rights of the parties in this action, and that by reason of it the cause was barred at the time it was commenced. In response to this position of defendant in error the plaintiff in error presents two propositions—the first that, under the stipulation “that the cause should remain a pending action until the Lillie case was disposed of in the supreme court,” such case not having been disposed of in the supreme court until June 10, 1902, the two-year statute had not run at the date of the commencement of this action, October 30, 1903; and, second, that the right of the plaintiff to bring this action was not governed exclusively by the provisions of sections 569 and 562 of the code, but rather by section 18, (Wilson's Rev. & Ann. St. 1903, §4216) which provides in substance that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, and shall be barred within two years thereafter; the petition alleging that the fraud complained of was not discovered until July 15, 1903.

As to the first proposition stated, the position of the plaintiff in error cannot be maintained. The judgment entered against the city and in favor of McKennon was so entered November 30, 1900, under the provisions of sections 569 and 562, and the pro-

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cedure there provided, for the vacation of a judgment, the statute of limitations began to run when the judgment was entered, and the fact that it might be vacated or modified upon an appeal does not affect the running of the statute. Such statute began to run when the judgment was rendered, and the right to proceed under such statute was barred two years thereafter, and this time elapsed one year before this action was commenced. The stay of execution, provided for in the agreement entered of record to the effect that the judgment should abide the determination of the supreme court in the Lillie case, was equivalent to a precudure in error to reverse, vacate, or modify the judgment upon the grounds of error in the procedure by which it was obtained. Such agreement did not involve a question of fraud extraneous of the record, and therefore had no relation to or bearing upon the question of fraud practiced in obtaining the judgment. The statute under consideration provides that the limitations provided for shall begin to run from the date of judgment, and we think it did begin to run in this case November 20, 1900, if the right of the parties are to be measured by the limitations provided for in sections 569 and 562.

This brings us to the consideration of the second proposition of the plaintiff in error, to-wit, that the action may properly be sustained because of the fact that limitations upon actions of this kind do not begin to run against the right to maintain the same until after the discovery of the fraud. In this we think the plaintiff in error is correct. Sections 569 and 562 are provisions of the Code of Civil Procedure which relate to proceedings to reverse, vacate, or modify judgments or orders in the courts in which they are rendered. Under such statute and the proceeding provided for an affirmative judgment reversing, vacating, or modifying the judgment to which the proceeding relates would leave the action pending in the court for trial as it stood before the alleged fraudulent judgment was entered, or it would authorize the entry of some other judgment if, as a conclusion of the proceedings it

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should be determined that the original judgment should be modified; and a proceeding for such purpose, although based upon the ground of fraud in procuring the original judgment, must be commenced within two years from the date of such judgment, or the proceeding will not lie. But that is not this case. This is an equitable action to cancel or enjoin the enforcement of an adverse right, upon the ground that it was fraudulently obtained; and we think it immaterial whether the right obtained by fraud and deception was a judgment which might be enforced against the person deceived and defrauded, or the acquiring by such means of title to specific real or personal property. The injury complained of amounts to the same thing. It is the deprivation of legal right and equity, and this action is brought for the purpose of canceling a judgment or a right complained of as having been fraudulently obtained. The judgment prayed for seeks the absolute cancellation and nullification of the judgment complained of, on the ground of fraud, and was, therefore, a civil action, as contemplated by article 3 of the Code of Civil Procedure, and subdivision 2 of section 18 of said article, which provides that the same may be brought within two years after the discovery of the fraud, or, rather, that such cause of action did not accrue until the time of the discovery of the fraud, and might be brought within two years from that date. The petition alleges that the fraud or fraudulent transaction complained of was not discovered until July 15, 1903, and, the action having been brought October 30, 1903, it was brought within time under the provisions of this statute, and was not barred by its limitations.

The demurrer under consideration challenges the sufficiency of the petition to constitute a cause of action, and, considering the allegations of the petition under this ground of the demurrer, we say generally that a party may have a good defense to an action, but, if he fails to make such defense when the case is called for trial, he will not be permitted to come in afterwards and say that the judgment was wrong, simply because he had a good de-

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fense. On the other hand, if a party is prevented by fraud from making his defense, such fraud vitiates any right acquired. This brings us to a consideration of the petition with reference to the allegations of fraud therein contained, and the sufficiency of such allegations to justify an annulment of such judgment on account of the acts of fraud therein complained of.

The allegations of the petition hereinbefore stated and set forth, and which are relied on as sufficient to vitiate the judgment complained of, are, first, that T. F. McKennon knew, when he brought suit as administrator of the estate of Francis R. McKennon, that such estate was not at that time the owner of the items of indebtedness for the recovery of which judgment was asked; second, that the mayor and members of the city council, including the city attorney, were deceived by the sworn statements and allegations of the said T. F. McKennon in his said action, and by his oral and positive statements to Adelbert Hughes, during the pendency of said action, that he was in possession and control of the items of indebtedness sued on, and the owner of the same, which statements were false, and made for the purpose of deceiving the plaintiff and its officers, and did deceive them, and that by reason of the verified petition of said McKennon and his said declaration of ownership Adelbert Hughes, city attorney of said city, was deceived, and because of such deception entered into the stipulation under and by force of which the judgment was rendered, which stipulation among other things admitted the ownership by T. F. McKennon as administrator, of the items sued on. We are of the opinion that this is not a sufficient allegation of fraud to justify the annulment of a judgment entered in a cause upon a stipulation or agreement as to the facts in the case. We think that the declaration of a party litigant to the effect that he has a right to recover because of his ownership of the chose in action is not the practice of such deceit and fraud as is contemplated in the axiom that fraud vitiates and annuls any right acquired by it.

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In the consideration of this matter, however, we are not left to the consideration alone of the bare allegations of the petition to the effect that the defendant was deceived by T. F. McKennon, for, turning to his (McKennon's) petition and verification of the same, shown by the record, we find the allegations such as to put a man of ordinary prudence upon his inquiry, for it is there averred "that the Guthrie National Bank claims some interest in a portion of the said claims, the exact nature of which the plaintiff is not able to state." And in the prayer for relief the interest of the Guthrie National Bank was noted in the following language: "Plaintiff further prays that, if it be necessary in order to fully determine the matters and things herein involved, the said Guthrie National Bank may be impleaded herein and required to set up any claim which it may have upon any of the said claims hereinbefore set out and referred to." And the verification of said petition by T. F. McKennon was as follows: "T. F. McKennon, being first duly sworn, upon his oath deposes and says that he is the administrator of Francis R. McKennon in the above entitled proceeding; that he is the *bona fide* owner and holder of the foregoing application and motion to the best of his knowledge and belief, except such interest, if any, as the Guthrie National Bank may have or hold in a portion of the said claims." Now, when we remember that the basis of this action is the fact, as alleged, that the Guthrie National Bank, at the time McKennon brought this action, had already reduced the items of debt claimed by McKennon to judgment, and it is because of that alleged fact that it is now sought to set aside the judgment of McKennon, we have before us, we think, not an actionable question of fraud, but rather a question of negligence, in which the one guilty of negligence is seeking relief from the legitimate result of his own acts, for the petition of McKennon upon which judgment was confessed gave notice of the possible adverse claim of the Guthrie National Bank, and the verification was modified to except the claims of the Guthrie National Bank, whatever they might be. To confess judg-

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ment upon a petition containing such allegations precludes the plea that the confession was the result of fraud in claiming to be the owner of the items sued upon, when in fact they were owned by the Guthrie National Bank.

The courts from time immemorial have laid down the doctrine in fraud cases that what is sufficient to put a man of ordinary intelligence upon inquiry touching a particular fact is equivalent to the ultimate knowledge of the existence of such fact; and, tried by this rule, the city of Guthrie must be held to have had knowledge of the right of the Guthrie National Bank in the items sued on at the time judgment was confessed, and which judgment is now herein complained of. The allegations in and verification of the petition of McKennon, which was before the lower court at the time the demurrer was sustained to the petition herein, were, we think, sufficient to justify that court in sustaining a demurrer to the petition, which attempted to set up a cause of action upon the ground of fraud in procuring the judgment complained of. The following authorities are instructive upon this proposition: *Wood v. Carpenter*, 101 U. S. 141; *U. S. v. Throckmorton*, 98 U. S. 61; *Crim v. Handley*, 94 U. S. 652; *Andres v. Millard*, 70 Fed. 515; *Nevins v. McKee*, 61 Tex. 412; *Snow v. Mitchell* (Kan.) 15 Pac. 224; *Bronson v. Reynolds*, 77 Tex. 254; *Carolus v. Koch*, 72 Mo. 645; *Zellerback v. Allenburg*, 67 Cal. 296, 7 Pac. 908.

The judgment of the court below is affirmed.

Burford, C. J., who presided in the court below, not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

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LYDIA E. GLAZIER, *as the Administrator of the Estate of HENRY E. GLAZIER, Deceased*, v. T. H. HENEYBUSS AND MARTHA HENEYBUSS.

(Filed September 5, 1907.)

(91 Pac. 872.)

1. **LIMITATION OF ACTIONS—Suspension—Delay.** A person can not prevent the operation of the statute of limitations by delay in taking action incumbent upon him.
2. **ABATEMENT AND REVIVAL—Death of Party—Strict Compliance With Statute.** Section 4624, Wilson's Statutes, fixing one year as the time within which an action may be revived in the names of the representatives or successors of the plaintiff, is not a mere limitation upon a remedy, but conditions the very right to revive; and parties seeking to avail themselves of its benefits must strictly comply with its terms.
3. **SAME—Consent of Defendant, When Necessary.** Under section 4624, Wilson's Statutes, upon the death of the plaintiff an order to revive an action in the names of the representatives or successors of a plaintiff shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made. The statute is not suspended until the appointment of the legal representatives, but begins to run after the expiration of a reasonable time from the death of the plaintiff in which a legal representative might have been appointed.
4. **SAME—Case.** Where the plaintiff in an action died on the 10th day of April, 1902, and without the consent of the defendant the order of revival in the name of the administratrix was made on the first day of December, 1903, and thereafter upon the hearing it was found that the order was not made within one year from the time it might have been first made, **Held**, that the action was barred by the statute, and section 4624 warranted a dismissal of the action.

Error from the District Court of Noble County; before Bayard T. Hainer, Trial Judge.

Affirmed.

Smith & Scott, for plaintiff in error.

Doyle & Cress, for defendants in error.

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GARBER, J.: This action to recover on two promissory notes was brought on the 27th day of September, 1901, in the district court of Noble county by Henry E. Glazier, as plaintiff, against the defendants in error, defendants below. Henry E. Glazier died on the 10th day of April, 1902. On May 12, 1902, his death being suggested to the court, on application of his heirs leave was granted to substitute his legal representatives as plaintiff. On March 27, 1903, upon the application of plaintiff in error, and over the objection of the defendants, the heirs were substituted as plaintiffs. On December 1, 1903, the order substituting the heirs as plaintiffs was set aside, upon the application of plaintiffs in error, and over the objections and exceptions of defendants in error an order was made reviving the action in the name of Lydia E. Glazier, administratrix of the estate of Henry E. Glazier, deceased. On January 28, 1904, the defendants filed their answer to the amended petition, alleging that the court was without jurisdiction and that the action could have been revived in the name of the administratrix within thirty days after the death of the plaintiff, and that the action was, therefore, barred by the statute of limitations. The administratrix filed a reply, admitting all the facts set up in the answer, except that the cause could have been revived in the name of the administratrix within thirty days after the death of the plaintiff, and that said action was barred by the statute of limitations. The issues thus joined were submitted to the court, a jury being waived, and judgment rendered in favor of the defendants for costs. The court found that the cause had not been revived within the time allowed by law for the revival of an action after the death of the plaintiff. From that judgment the plaintiff in error prosecutes this appeal, and asks a reversal of the cause upon the ground that the statute of limitations begins to run, not from the death of the plaintiff, but from the date of the appointment of the administratrix.

This question is presented to the court for the first time, and

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necessitates a consideration and construction of sections 4620 and 4624 of Wilson's Revised and Annotated Statutes, 1903. At common law the action abated upon the death of the party before trial or verdict, and if the cause of action was of the character that did not survive, death put a final end to the suit. If the cause was one that did survive, or could survive, plaintiff or his personal representative was required to bring a new action. In order to obviate the necessity of bringing a new action, and to remedy that defect of the common law, requiring a new action to be brought where the cause of action survived, statutes have been adopted in England and in the various states of the Union, providing that the representatives of the deceased party, within limitations and upon compliance with certain conditions, might be made parties to the suit and the action proceed. Section 4620 of our statutes provides: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." In this case, upon the death of the plaintiff, the right of action passed, not to his heirs, but to the administratrix of his estate. The subject-matter of the action was a part of the personal estate, and subject to the payment of the debts of the deceased, if judgment be secured and satisfied. The attempted revival in the names of the heirs was, therefore, a nullity, and is of no consequence in the determination of the question in this case.

This was virtually admitted by plaintiff in error in filing a subsequent motion asking that the order of revival in the names of the heirs be set aside and the action be revived in the name of the administratrix. Hence the real battle in this case is waged over the construction of section 4624, fixing the time in which an order of substitution and revival might have been made in the name of the administratrix. The section reads as follows: "An

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order to revive an action, in the names of the representatives or successors of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been made * * *

These sections of our statute were taken from the Kansas statute, and with their adoption came the construction of the supreme court of that state. The simple statement of the familiar and accepted rule of construction would ordinarily be considered a final and satisfactory disposition of the case, especially when the foreign state has repeatedly construed the section in question; but in this case a strenuous and heated controversy is waged over the question as to what construction has been placed upon that section of the statute by the supreme court of that state, and numerous authorities are cited in support of the respective sides of the controversy. As a precautionary measure, before entering upon an investigation of the authorities, for perspicuity, we add the term "latest" to the statement of the general rule of construction, so as to read: By the adoption of the statute of a foreign state, we adopt the "latest" construction of that statute at the time of its adoption by the supreme court of that state.

In the case of *Bauserman v. Blunt*, 147 U. S. 647, removed from the state court of Kansas to the circuit court of the United States, upon the authority of *Toby v. Allen*, 3 Kan. 399; *Hanson v. Towel*, 19 Kan. 273; and *Nelson v. Herkel*, 30 Kan. 456, 2 Pac. 110, it was held that the operation of the statute was suspended until an administrator had been appointed; and, while that case was pending on appeal in the supreme court of the United States, the same question was presented to the supreme court of the state of Kansas in the case of *Balserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, and, upon a careful examination and consideration of the question and a review of the prior decisions of that court, it was held that an action by another creditor against the defendant was barred by the statute, because the plaintiff had unreasonably delayed to apply for the appointment of an administrator. Chief

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Justice Horton, who had delivered the opinion in *Nelson v. Herkel*, *supra*, after referring to the case cited above as holding that "the death of the debtor operates to suspend the statute," added: "But this court has never said, when the question was properly presented, that a creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitation indefinitely"—citing *Amy v. Watertown*, 130 U. S. 320, wherein it was said: "When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or institute such proceedings as the law regards sufficient to preserve it"; also the cases of *Atchison, etc., Railroad Co. v. Burlingame Twp.*, 36 Kan. 638, 14 Pac. 271, and *Roark v. Douglas Co.*, 46 Kan. 175, 26 Pac. 393, as establishing the proposition that "a person can not prevent the operation of the statute of limitations by delay in taking action incumbent upon him", and that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitations, which are statutes of repose, founded on sound public policy, and which should be so construed as to advance the policy they were designed to promote," and, following these decisions, the court arrived at the conclusion that the plaintiff's claim was barred by the statute, and said: "A reasonable time within which a creditor, having a claim against a decedent, and wishing to establish the same against his estate, should make application for administration would be, under the statute, fifty days after the decease of the intestate, or at least within a reasonable time after the expiration of fifty days; but a creditor can not, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years, he can do so for any indefinite length of time, and then resort to administration and establish his claim. This is certainly not in accord with the policy of the statutes and is not a fair construction of our prior decisions."

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In the case of *Bauserman v. Blunt*, *supra*, in the supreme court of the United States (147 U. S. 647), Mr. Justice Gray, delivered the opinion of the court, in reviewing the various decisions of the supreme court of the state of Kansas upon this question, referring to the case of *Bauserman v. Charlott*, *supra*, in conclusion, said: "That decision was evidently deliberately considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed; it is supported by satisfactory reasons and is in accord with well-settled principles; and there is no previous adjudication of that court to the contrary. In every point of view, therefore, it should be accepted by this court as conclusively settling that the operation of the statute of limitations of Kansas is suspended after the death of a debtor for fifty days only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the fifty days."

As the proceedings to revive an action and the proceedings to revive a judgment are substantially the same, and must correspond to the same formula we cite the following cases in support of the rule herein announced: *Angell v. Martin*, 24 Kan. 335; *Railway Company v. Smith*, 40 Kan. 192, 19 Pac. 636; *Cunkle v. Railroad Co.*, 54 Kan. 194, 40 Pac. 184; *Berkley v. Tootle*, 62 Kan. 701, 64 Pac. 620; *Reaves v. Long*, 63 Kan. 700, 66 Pac. 1030; *Steinback v. Murphy*, 70 Kan. 487, 78 Pac. 823.

In the case at bar the order of revival in the name of the administratrix was not made until one year, seven months, and twenty-one days after the death of the plaintiff, and not until one year, six months, and nineteen days after the suggestion of the death of the plaintiff, and leave to revive was granted in name of personal representatives. The answer and reply put in issue the question of fact when the order of revival "might have been first made." The plaintiff in error was a resident of Noble county, and, upon the death of the deceased, April 10, 1902, she could have applied for letters of administration, and, upon giv-

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ing thirty days' notice, have been appointed administratrix of the estate of the deceased. On the 12th day of May, 1902, she suggested the death of the deceased, and, upon giving thirty days' notice from that date, had she filed her petition, she could have been appointed the legal representative, and had the order of revival "made forthwith"; but, instead, the order of revival was not made until December 1, 1903, or nearly eighteen months after the time in which it "might have been made." Without the consent of the defendants, and no showing for the delay, can it be said that the district court erred in finding that the order of revival was not made within one year from the time it "might have been first made?" There is either a limitation, or there is none. The legislature has undoubtedly said that there is a limitation. If there is, in the language of the statute, "the order of revival upon the death of the plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made." Without a revivor an action abates upon the death of the party, and without a statute there can be no revivor. The language "shall not be made" is peremptorily prohibitive. It imposes an absolute prohibition upon the granting of the order after the lapse of one year after the time when it "might have been made." At the expiration of that time the right ceases to exist. It is true the order of revival could not have been made until the appointment of the administratrix; but it was within the power of plaintiff in error to have had that appointment made. It was a condition precedent to the order of revival. The law required her to act. She offers no evidence explanatory of the delay. She knew of the death of the plaintiff. The law said: "You may be appointed administratrix, if you file your petition and give the required notice." There were no other petitions filed for that appointment; and her petition, when filed, was not contested.

It is argued, however, in support of the position that the statutes should not begin to run until the appointment of a legal

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representative, that unscrupulous persons could prevent the appointment by contest and appeal for over one year, and, although the action might involve the whole estate, it would be forever barred. The plain language of the statutè reads: "From the time when the order might have been first made," and is sufficient answer to that argument. It is not for the courts to mitigate, by opinion, the harshness of the law of limitations. It is their duty to declare the law as they find it. The limitation of revivor is arbitrary, exacting, requiring diligence, good faith, prompt action, and he who seeks its benefits must be able to show that he has complied with all its terms. Hardship or inconvenience is insufficient. Practical impossibility, alone, will satisfy. 19 A. & E. Ency. of Law, 216. It was clearly the duty of the plaintiff in error to file her petition for letters of administration and secure the appointment as administratrix of the estate. Section 4624, construed in connection with those statutes governing the appointment of legal representatives, gave her ample time, and during the diligent prosecution of the necessary steps to secure her appointment the statute of limitations would be suspended. Under the pleadings and evidence in this case the trial court was warranted under section 4625 in dismissing the action.

We have carefully examined the authorities cited by counsel which support the general rule; but, having adopted the statutes of the state of Kansas with the construction placed thereon by the supreme court of that state, they are not applicable in this case. The case of *Steinback v. Murphy et al.*, *supra*, decided by the supreme court of that state in 1904, clarifies any uncertainty that may appear in the opinion of that court rendered in 1896 in the case of *Rexroad et al. v. Johnson*, 4 Kan. App. 333, 45 Pac. 1008.

There being no other error assigned or presented, upon the authorities above cited, the judgment of the district court of Noble county, dismissing the action, is affirmed.

Hainer, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

Lewellen C. Lane v. Choctaw, Oklahoma & Gulf R. Co.

LEWELLEN C. LANE, V. CHOCTAW, OKLAHOMA & GULF RAILROAD
COMPANY.

(Filed September 5, 1907.)

(91 Pac. 883.)

1. **PLEADING—Amendment—Status of Superseded Petition—Contents as Evidence.** Where an amended petition is filed in a cause, and no part of the original petition is referred to or adopted into the amended petition, such original petition is superseded, and is no part of the record, and, while it may be introduced in evidence by the adverse party the same as any other writing signed by the party, subject to be explained, its contents cannot be considered upon the trial either as a part of the record or as admissions of the plaintiff, unless introduced in evidence.
2. **CARRIERS—Passengers—Personal Injuries—Pleading Rules and Regulations.** Where the plaintiff sues a carrier of passengers for injuries alleged to have been received by him by the negligence of the carrier while riding on a baggage car, the carrier must plead its rules and regulations relating to passengers and where they may ride, and allege the violation thereof by the plaintiff; if it desires to avail itself of such a defense.
3. **SAME—Contributory Negligence.** It is not, under our statutes, negligence *per se* for a passenger on a mixed railroad train to occupy a seat in a baggage car.
4. **SAME—"Proper Accommodations."** It is the duty of a carrier of passengers for reward to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and "proper accommodations" means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers.
5. **SAME.** A carrier of passengers for hire is not allowed to overcrowd its vehicles or cars, and a passenger who goes upon a train for passage is not negligent in occupying a position in the baggage compartment of a combination car, where there are no unoccupied seats in the passenger compartments or coaches.
6. **SAME.** In order to absolve itself from liability for injuries to a passenger riding in its baggage car, the carrier must adopt and post in a conspicuous place in its passenger cars printed rules and regulations forbidding or warning passengers not to ride in such baggage car, and must, in addition to such notices, provide

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such passenger with proper accommodations in the passenger cars.

7. **SAME—Questions for Jury.** Where a carrier is operating a mixed train, and a passenger goes upon such train with his ticket for passage and finds no vacant seats in the passenger cars, or there are no printed rules posted in the passenger coaches in such train, warning passengers not to ride in baggage cars, it is not negligence for such passenger to take a seat in a baggage car; and the questions of whether the train was overcrowded or the rules posted, if controverted, are questions for the jury and not the court.
8. **TRIAL—Directing Verdict—Error, When.** Where there is a material controverted question of fact upon which reasonable minds might fairly come to different conclusions, it is error for the court to direct a verdict

(Syllabus by the Court.)

*Error from the District Court of Pottawatomie County; before
B. F. Burwell, Trial Judge.*

Reversed and remanded.

*Blackeney & Mazey and W. B. Crossan, for plaintiff in error.
C. B. Stuart and Thos. R. Beman, for defendant in error.*

STATEMENT OF THE CASE.

The plaintiff in error, L. C. Lane, commenced his action in the district court of Pottawatomie county against the Choctaw, Oklahoma & Gulf R. R. Co. for the purpose of recovering damages for injuries alleged to have been caused by the negligence of the defendant's servants in the operation of a railway train upon which he was a passenger in May, 1902. The Choctaw, Oklahoma & Gulf Railroad Company was at the time a common carrier of freight and passengers by steam railway between the stations of Tecumseh and Shawnee, in Pottawatomie county, Oklahoma, as well as to other points both north and south of said stations. On the day of the alleged accident the company was operating a mixed train, composed of different cars for passengers, baggage, and freight, and the plaintiff purchased a ticket at the railway station of Tecumseh, and at the proper time boarded the train

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with a number of other passengers, and, observing no unoccupied seat in the compartments intended for passengers, went into a compartment used for transporting baggage and took a seat upon a box therein located. The car in which he took passage was a combination car, one portion or end of which was regularly provided with seats for passengers, and the other portion or end was used for baggage. There was a door opening between the two compartments. The train started north from Tecumseh station towards Shawnee, and the plaintiff and several other passengers were occupying the baggage compartment of the combination car. Whether there was a separate passenger coach in the train, in addition to the combination coach, was a disputed question of fact on the trial, there being evidence both ways on the subject. The train ran about a quarter of a mile and then stopped; the engine was detached from the train and ran on to a switch where it picked up three or four freight cars, either flat or box, conveyed them onto the main line and coupled them to the cars containing the passengers. When the engine backed up with the freight cars attached to make the coupling onto the passenger cars, it is claimed that they were struck with such speed and force as to pitch the plaintiff off the box upon which he was seated, thereby causing certain injuries to one of his limbs which developed into such a diseased condition as to require his leg to be amputated, and for his suffering, loss of limb, expense of sickness, and treatment he brings this action, based upon the alleged negligence of the railway company in operating its train. The amended petition sets out the facts specifically and at length. The company answered by a general denial, coupled with an averment, in general terms, of contributory negligence on the part of the plaintiff. The plaintiff replied by general denial. The case was tried to a jury, and after all the evidence was introduced by both sides the court directed a verdict for the defendant, and entered judgment of nonsuit. The plaintiff brings the cause here on petition in error.

Opinion of the Court.

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BURFORD, C. J.: We are advised that the trial court held, as a matter of law, that by going into the baggage compartment and riding there the plaintiff was guilty of such negligence *per se* as would prevent a recovery of damages. Preliminary to a discussion of this question, there are some questions of practice which arose upon the trial that should be settled.

The plaintiff filed an original, a first, and second amended petition. In the original petition it is averred that the train upon which plaintiff took passage was a mixed train, composed of one passenger coach, one combination passenger and baggage coach, several box or freight cars, and a locomotive. In the amended petitions the averment is made that the train consisted of one combination passenger and baggage car, certain freight cars, and one locomotive. It is stated in the brief of plaintiff in error that the trial court, in deciding the case, held that the averment in the original petition that there was a passenger coach in the train was an admission by the plaintiff against his interest, and was conclusive against him and not subject to explanation or controversy. The original pleading was not introduced in evidence. The rule stated is one that applies to the pleadings upon which the case is submitted for trial. In the case of *Lane Implement C. v. Lowder and Manning*, 11 Okla. 61, 65 Pac. 926, this court, in discussing a similar question, stated the law to be that "where a party to an action makes solemn admissions against his interests in a pleading, in the absence of mistakes on his part or on the part of his counsel who inserted them in such pleading, a court, in passing upon the sufficiency of a subsequent amended pleading filed by him, should take such admission into consideration and treat them as admitted facts in the case." No authority is cited supporting this rule. It is probably stated too broadly, and is subject to some modification. The rule as stated *supra* is correct as applied to an amendment to a pleading, but the general rule is that an original pleading is superseded and its

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effect as a pleading destroyed by filing an amended pleading which is complete in itself and does not adopt any of the former pleading by reference. 1 Enc. Pl. & Pr. 625. In any case a distinction should be made between an admission and an allegation. One is in the nature of a confession of a fact averred by the adverse pleader; the other is an averment against the adverse pleader, which must be supported by proof. The authorities are not at all harmonious as to the effect to be given upon the trial to superseded pleadings. A few courts, and principally California, seem to have adopted the rule that a pleading which has been withdrawn by an amended pleading cannot be considered for any purpose on the trial; it being considered unjust to hold a party bound by statements which may have been inserted by inadvertence or mistake, and which he has voluntarily abandoned by filing a new pleading. *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKebben*, 54 Cal. 192; *Mecham v. McKay*, 37 Cal. 154; *Ponca v. McElvy*, 51 Cal. 222; *Kentfield v. Hays*, 57 Cal. 409; *Pfister et al. v. Wade et al.*, 10 Pac. 369. But such superseded pleadings may be used for impeachment purposes when relevant. *In re O'Conner Estate*, 118 Cal. 69, 50 Pac. 4. In *Smith v. Pelott et al.*, 18 N. Y. Supp. 301, it was held that upon the trial the averments of the superseded pleadings could be considered, whether introduced in evidence or not; but this rule has but little support. The weight of authority and better reasoned cases support the rule that a pleading or an admission or allegation in a pleading, notwithstanding it may have been withdrawn, stricken out or superseded by an amended pleading, is competent in evidence, and may be introduced against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by the party who made it. This rule rests on the general principle that whatever a party has said about his case may be proved against him, and whatever writing he has signed or authorized may be, if relevant, introduced against him, the weight of such evidence to be left to the court or jury trying the case.

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Abbott's Trial Brief (2nd Ed.) pp. 296, 297; *Solomon Ry. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Reill v. Likowski*, 33 Kan. 515, 6 Pac. 886; *Jockers v. Borgman*, 29 Kan., 109; *Brown v. Pickard*, 4 Utah, 292, 9 Pac. 537; *Kilpatrick D. G. Co. v. Box* (Utah) 45 Pac. 629; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *Schad v. Sharp*, 95 Mo. 573; *Stone v. Cook*, 79 Ill. 424; *Hall v. Woodward*, 30 S. C. 564; *B. & O. & C. R. R. Co. v. Evarts*, 112 Ind. 533; *Ludwig v. Blackshere*, 102 Iowa, 366; *Jeneau v. Stunkle*, 40 Kan. 756, 20 Pac. 473; *Walser v. Wear*, 141 Mo. 443; *Woodworth v. Thompson*, 44 Neb. 311; *Strong v. Dwight*, 11 Ab. Pr. N. S. (N. Y.) 319; *Willis v. Tozer*, 44 S. C. 1; *Goodbar Show Co. v. Sims* (Tex. Civ. App.) 43 S. W. 1065; *Or. R. R. & Nav Co. v. Ducres*, 1 Wash. 195, 23 Pac. 415; *Linder v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526; *Daub v. Engleback*, 109 Ill. 267; *Folger v. Boyington*, 67 Wis. 447; *Vogel v. Osborn*, 32 Minn. 167. In this case the superseded petition was not introduced in evidence, and its contents were not proper to be considered, either as admissions of record or as evidence in the case. The rights of the parties should have been determined upon the averments contained in the pleadings upon which the cause proceeded to trial, regardless of any former pleadings, unless properly offered and admitted in evidence.

Another question of practice relates to the question of pleading. The defendant, prior to the trial, asked for leave to file an amended answer, in which the company alleged compliance with the statutory regulations requiring rules and regulations to be posted in the passenger cars, and the violation of such rules by the plaintiff. This plea was in the nature of confession and avoidance, or by way of justification. The court refused the request to file the amended answer, and the case went to trial upon the issues made by the defendant's general denial and plea of contributory negligence, which was denied by the plaintiff. Upon the trial, the court, over the objection of the plaintiff, permitted the defendant to offer evidence tending to show that it had

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posted on the baggage room door a warning, and that the company had issued to its trainmen printed regulations relating to the prevention of passengers riding upon the platform and in baggage cars. This evidence was not admissible under the issues formed, and it was error to admit it. It has been held that, in order to entitle the carrier to make the defense that it has adopted and promulgated rules and regulations which the passenger has violated, it must plead its rules and allege the facts which constitute the defense, and we think this a sound rule of practice. *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62; *Weymouth v. Broadway, etc., R. R. Co.*, 142 N. Y. 681; *Vail v. Broadway, etc., R. R. Co.*, 147 N. Y. 377.

The question as to whether the court rightfully took the case from the jury and decided as a matter of law that the plaintiff was guilty of such contributory negligence as would prevent a recovery is the controlling one in this case. It is uncontroverted that the plaintiff was a passenger upon the defendant's train. The train was a mixed train, carrying both freight and passenger cars. The plaintiff went into the baggage compartment of the combination coach, and there took a seat upon a box, and there remained until he was hurt, after which he got onto a flat car and rode. No one in charge of the train either directed him into the baggage car or objected to his occupying the same. There were a number of other passengers occupying the baggage car at the time. It was the custom for passengers to occupy the baggage compartment between the stations of Tecumseh and Shawnee, and the conductor took fare from those in such car and made no objection to them riding there. The plaintiff had a ticket when he went upon the train to take passage to Shawnee, but his ticket was not taken up until after the accident. There was printed upon the door between the passenger and baggage car the words "No admittance." The door was standing open, and, when open, these words were not visible to one in the passenger compartment. The company had printed rules and regulations forbidding em-

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ployes to allow passengers to ride in the baggage car. There was no proof of any rules or regulations being posted in the passenger coach or compartments for passengers in the train. It was a controverted question of fact as to the number of passengers on the train. It was a controverted question as to whether there was a passenger coach in the train in addition to the combination car. It was a disputed question as to whether the train was crowded, and whether there were any vacant seats in the passenger compartments at the time of the accident. It was a disputed question as to whether the plaintiff could have found a seat had he gone through the train. The combination car, in which plaintiff rode and was hurt, was the rear car in the train. There was nothing in the position occupied by plaintiff in the baggage car that could in any manner have contributed to his injury, except the fact that he was not sitting in a seat intended for occupancy by passengers. Upon the foregoing state of facts, what was the duty of the court?

Several of our state courts hold to the doctrine that a passenger is entitled to a seat in a passenger coach, and if he fails to occupy such seat, and occupies a place not intended for passengers, he is guilty of negligence *per se*, and is precluded from recovery, if injured while occupying such position; that he may demand a seat, and, if the carrier fails to provide him with one, he may retire from the train and maintain an action against the carrier for damages. This may be the safe and conservative rule, but it is not the practical one. Passengers arrange for their dates of travel, and arrange for their business at their destination. They arrange for train and business connections and have a right to rely upon the business of the carrier, when they purchase a ticket or engage passage, to receive them at the proper time and place, to provide them with necessary and usual accommodations, to transport them upon usual and regular trains, and deliver them at the destination their ticket calls for; and if, upon entering the train as a passenger, they find it overcrowded and no seats un-

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occupied, they have the right to seek the next most available place, the one that reasonably offers the place of greatest safety, and with proper caution occupy the same until the carrier shall provide him with better. Our legislature, following the example of some of the older states, recognized this right at an early period of our territorial existence, and enacted statutory provisions which, in a great measure, control the determination of the question before us. These provisions are as follows:

Wilson's Statutes, 1903, sec. 657: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Section 658: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

Section 659: "A carrier of persons for reward must not overcrowd or overload his vehicles."

Section 660: "A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, must treat them with civility, and give them a reasonable degree of attention."

Section 712: "A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time."

Section 713: "A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows."

Section 714: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application and reasonable."

Section 1050: "In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of its passenger cars, then in the train, such

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corporation shall not be liable for the injury; provided, it had furnished room inside its passenger cars sufficient for the accommodation of its passengers."

Section 1051: "When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars, or on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars."

When the plaintiff purchased his ticket and paid his fare to the station agent at Tecumseh, he was a passenger for reward and entitled to transportation upon the defendant's train from Tecumseh to Shawnee; and it was the duty of the railway company to provide him a suitable vehicle in which to ride, safe and fit for the use, to provide him with such accommodations as were usual and reasonable, to provide him with a seat and give him a reasonable degree of attention, and no degree of care would excuse any default in this respect. The railway company was a carrier of persons for hire or reward, and was operating a mixed train consisting of passenger and freight cars, upon which it received the plaintiff as a passenger. In such case the law required of the carrier the "utmost degree of care and diligence for his safe carriage," and imposed upon it the same responsibility and duty as for carrying passengers upon passenger cars. It is true the carrier is permitted to make rules and regulations for the conduct of its business, and if such rules are lawful, are public, reasonable, and uniform in their application, may require the passengers to obey them. The manner of making such rules public, so as to charge passengers with notice thereof, is prescribed by the statute—they must be "posted up at the time in a conspicuous place inside of its passenger cars then in the train." If such regulations are so posted, and the passenger is injured while violating such reasonable rules, then such passenger cannot recover, provided the carrier had furnished room inside its passenger cars sufficient for the accommodation of its passengers. The statute exempts the carrier from liability for injuries to a passenger when

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injured on a platform or in a baggage car, when it has performed two conditions, viz.: Posted up in its passenger cars in a conspicuous place printed regulations forbidding the passenger to occupy such places, and provided him with sufficient accommodations in its passenger coaches. It necessarily follows that if the carrier has failed in either of these requirements, and the passenger is injured by the negligence of the carrier while riding upon the platform or in the baggage car, the carrier is liable for such injuries.

Whether the statute relating to the liability of carriers for injuries to passengers upon platforms or in baggage cars is an adopted one we are not advised, but an examination of the adjudicated cases discloses that the states of New York and Missouri each have statutes identical in language with ours. They have been in force in those states for more than half a century, and have received uniform construction. It is held in both states that it is the duty of the carrier, if it has adopted rules and regulations respecting the carrying of persons upon the platform of cars or upon baggage cars, that in order to charge the passenger with the observance of such rules they must be printed and must be posted up in the passenger cars in such conspicuous place as will be observable to passengers within the cars; that no mere words or warnings will fill the requirements of this statute, but the printed rules or regulations must be actually posted; also, that the carrier must provide the passenger with a seat in its passenger cars, and that if any of the seats are occupied with luggage or one passenger is occupying more than one seat he is not bound to request such obstructions removed, but may seek some other unoccupied place. *Nolan v. Brooklyn, etc., R. R. Co.*, 87 N. Y. 62; *Werle v. Long Island R. R. Co.*, 98 N. Y. 650; *Willis v. Railroad*, 34 N. Y. 670; *Weymouth v. Broadway, etc., Co.*, 22 N. Y. Supp. 1047; *Merwin v. Manhattan Ry. Co.*, 113 N. Y. 659; *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336; *Morrison v. Erie R. R. Co.*, 56 N. Y. 307; *Schaefer v. Union Ry. Co.*, 51 N. Y. Supp. 431; *Wey-*

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mough v. Broadway, etc., Co., 142 N. Y. 681; *Vail v. Broadway, etc., Co.*, 147 N. Y. 377; *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62; *Wagoner v. Mo. Pac. Ry. Co.*, 97 Mo. 572; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223; *Gersite v. U. P. Ry. Co.*, 23 Mo. App. 361; *Chaney v. L. & M. Ry. Co.*, 176 Mo. 598; *Higgins v. Han. & St. Joe R. R. Co.*, 36 Mo. 418; *Choate v. Mo. Pac. Ry. Co.*, 67 Mo. App. 105. The rule deduced from these cases, under statutory provisions like ours, is that it is not negligence *per se* for a passenger to ride upon a platform of a moving car or in a compartment not intended for the use of passengers, where the trains are overcrowded, or he cannot without great danger or difficulty find a seat in a passenger coach, even though the carrier has provided coaches for its passengers and has posted notice of its rules and regulations; that in case of injury to a passenger while on a platform or in a baggage car the question of the passenger's negligence in occupying such place is one of fact to be determined by the jury.

But notwithstanding these statutory provisions, which are plain and controlling, we think the great weight of modern and well considered cases support the doctrine that, if the train is crowded, it is not negligence *per se* for the passenger to occupy the platform or baggage car, and the question as to whether he was justified in assuming such risk is one for the jury. It is said in *Hutchinson on Carriers* sec. 1198 (3rd. Ed.): "If, however, the railway company has permitted the car to be overcrowded, the passenger will not as a matter of law be chargeable with negligence in riding upon the platform, and the question whether in any particular case he was justified in doing so will ordinarily be one of fact for the jury. But when the car is overcrowded and in consequence the passenger is obliged to ride upon the platform, he must exercise for his safety a degree of care commensurate with the increased danger usually incident to such an exposed place, and if he fails to do so, and injury results, his conduct will preclude him from the right of recovery. While there are cases which hold that the passenger will be justified in riding upon the platform if he is unable to obtain

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a seat in the car, the better rule would seem to be that if there is standing room within the car he should stand inside rather than expose himself to peril by riding upon the platform. He is not required, however, to disregard the usual courtesies of life in order to get an advantage over other passengers in securing a place within the car. If, therefore, the car should be so crowded that the passenger, in the exercise of reasonable prudence, would be justified in concluding that he could not get inside without unreasonably pushing or crowding his way, he would be under no duty to attempt to enter, and it would not be negligence for him, under such circumstances, to ride upon the platform." Our statute places the riding upon the platform and in a baggage car under the same rule.

Judge Thompson, in his masterful work on the Law of Negligence (2nd Edition, vol. 3, sec. 2958), says: "Upon the question whether contributory negligence is to be ascribed to a passenger who is hurt while riding in the baggage or express car under such circumstances that he would not have been hurt if he had remained in a passenger car, there is considerable conflict of judicial opinion. It is no doubt a reasonable regulation that passengers shall not ride in the baggage car. The safety of the passengers, the impeded discharge of duty by the company's servants, and the security of the property conveyed therein, are considerations in support of this rule. Moreover all passengers are probably aware that the hazard of travel are increased by riding in this portion of the train. *Prima facie*, therefore, a passenger who, unless excused by special circumstances, elects to ride in the baggage car instead of remaining in one of the passenger coaches—assuming that there is room for him—commits an impropriety of such a character that, in case he is injured while so riding and the circumstances are such that he would not have been injured if he had remained in one of the passenger coaches, he will be precluded from recovering damages from the company, unless it appears that he is riding there by permission of the conductor, for the benefit of the company." It will be observed that Judge Thompson holds that the passenger riding in the

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baggage car is guilty of indiscretion, and *prima facie* negligent, when he elects to ride in the baggage car, when there is room for him in the passenger coach, and, unless excused by special circumstances, such as riding there with the permission of the conductor for the benefit of the company, or where the regulations are habitually disregarded, or it is customary to convey and accept fare or tickets from passengers in the baggage car without objection by those having the management of the train. The rule that the passenger will not be guilty of negligence *per se* by riding upon the platform or in the baggage car, when the platform or passenger cars are crowded, or when he is unable to observe any vacant seats, but that the question as to whether he acted under all the circumstances as a reasonably prudent man would have acted, and whether the position he occupied at the time of the accident was one of increased risk or in fact bore any causal relation to the injury, is supported by the following authorities, in addition to those cited *supra*: *Hardenbergh v. St. P. & M. R. R. Co.*, 39 Minn. 3; *Thorpe v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 404; *St. L. & I. M. Ry. v. Leigh*, 45 Ark. 368; *Louisville, N. O. & Tex. Ry. v. Patterson*, 69 Miss. 421; *Jacobus v. St. Paul & C. Ry.*, 28 Minn. 134; *C. & O. Ry. v. Jordan* (Ky.) 76 S. W. 145; *Kentucky Central Ry. v. Thomas*, 79 Ky. 160; *Morgan v. L. S. & M. S. Ry.*, 70 L. R. A., 609; *Lynn v. So. Pac. Ry.* (Cal.) 24 L. R. A. 710; *McGuire v. Middlesex Ry. Co.*, 115 Mass. 239; *L. S. & M. S. Ry. Co. v. Kelsey*, 180 Ill. 530; *Chicago & Western Ind. Ry. v. Newell*, 212 Ill. 332; *Benedict v. Mil. & St. P. Ry.*, 86 Minn. 224; *Lynn v. So. Pac. Ry. Co.*, 103 Cal. 7; *Bonner et al. v. Glenn* (Tex.) 15 S. W. 572; *C. & A. Ry. v. Fisher*, 141 Ill. 614; *C. & O. Ry. v. Long*, 100 Ky. 221; *Graham v. Receiver*, 20 Wash. 466; *Marquette v. C. & N. Ry. Co.*, 33 Iowa 564; *Penn. Ry. Co. v. Paul*, 126 Fed. 157 (C. C. A.); *Dennis v. Pittsburgh, etc., Ry. Co.*, 165 Pa. 624; *G. H. & San A. Ry. Co. v. Morris*, 94 Tex. 505; *Trumbull, Rec., v. Erickson*, 97 Fed. 891 (C. C. A.); *Highland Av. & B. R. R. v. Donovan*, 94 Ala. 299; *Pray v. Omaha St. Ry.*, 44 Neb. 167; *Blake v. Burling-*

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ton, C. R. & N. Ry Co., 89 Iowa 8; *B. & O. Ry. v. Slate*, 72 Md. 36; *Cody v. N. Y. & N. E. R. R. Co.*, 151 Mass. 462; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223; *N. Y. L. E. & W. Ry. Co. v. Ball*, 53 N. J. Law 283; *Washburn v. Nashville, etc., R. R. Co.*, 40 Tenn. 638; *International & G. N. Ry. v. Ormond*, 64 Tex. 485.

We think the court erred in taking this case from the jury. A number of witnesses testified that the train was so crowded when the plaintiff went upon the train, that no seats could be obtained, and some testified that it was even difficult to get to the door of the car. Upon the other side, evidence was submitted to the effect that there were several vacant seats in one of the passenger cars, and that there was no difficulty in getting into the passenger coaches. This was a material question in the case. It was also a material question whether the carrier had posted notice of its rules and regulations relating to passengers occupying the baggage car. We think, in view of the fact that the compartment occupied by the plaintiff was in the rear of the train and he was sitting upon a box in an unexposed part of the car, that there is a debatable question as to whether the position he occupied was any more hazardous than a seat in the passenger coach, if there was such a car in the train. These questions were questions of fact, upon which reasonable minds might fairly come to different conclusions.

The judgment of the district court is reversed, and a new trial ordered, at the costs of the defendant in error.

Burwell, J., who presided in the court below, not sitting; Irwin and Pancoast, JJ., absent; all the other Justices concurring.

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CYRUS KIMMELL v. OLIVER POWERS, *Executor, et al.*

(Filed September 5, 1907.)

(91 Pac. 687.)

1. **PRINCIPAL AND AGENT—Relationship—Case.** A contract, whereby the owner of an addition to a town gives to another the management and exclusive sale of the same for a period of ten years, and agrees to pay to such person twenty-five per cent. of the proceeds of sales, after deducting the current expense, and also agrees that, if any part of the addition remains unsold at the end of that time, it shall be appraised and the owner to have three-fourths thereof and the other party one-fourth, constitutes the relation of principal and agent, and does not vest the agent with any interest in the real estate itself.
2. **SAME—Termination of Agency—Death of Party.** Where the relation of principal and agent exists, the death of either party terminates the agency, except where the agent has a pecuniary interest of his own in the execution of the agency.
3. **PLEADING—Petition—Demurrer.** Where a petition neither states a cause of action in equity or at law, a demurrer thereto should be sustained.

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Affirmed.

Black & Trosper, for plaintiff in error.

Stevens & Myers and Hudson & Keys, for defendants in error.

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BURWELL, J.: James R. Woods was the owner of a valuable claim adjoining the city of Lawton, which was afterwards platted and known as Woods' Addition to that city. On March 5, 1902, Mr. Woods died, and the legal title to this land became vested in his wife, who was a daughter of the plaintiff. After the death of James R. Woods, the plaintiff, on October 17, 1902, entered into a written contract with his daughter, Alta M. Woods, whereby it was agreed that the plaintiff should have charge of the selling and

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management of this addition, as well as the management of investments to be made with Mrs. Woods' money. The contract is as follows:

"This contract made and entered into this 17th day of October, 1902, by and between Alta M. Woods, of Lawton, Oklahoma, or Norton, Kansas, party of the first part, and Cyrus Kimmell, of El Reno, party of the second part.

"Witnesseth: That said party of the second part does hereby covenant with the party of the first part, her heirs, executors, and assigns to take charge of all the business interests of the party of the first part in Lawton, Oklahoma, and elsewhere consisting of the sale of lots, blocks, adjusting legal difficulties, railway right of way case, and all matters pertaining to the Woods Addition whatsoever.

"That the party of the second part shall have control of the sale of the Woods Addition in Lawton, Oklahoma, for a period of ten years hereof, and shall receive for such services twenty-five (25) per cent. of the proceeds of such sales after deducting current expenses of the same, such division to be made on or about the first day of January of each year during the term of this contract and before investing the proceeds of the sales and other income for the previous year, provided however, that the party of the second part shall not receive a per cent. of the settlement for the right of way through said addition which may be granted to the Oklahoma City and Western Railway Company and that the party of the second part shall have full control of each investment for a period of ten years from date of each investment but in all matters of investment whenever practical before investing said money, is to counsel with the party of the first part regarding such investment; that he shall seek according to his best judgment safe and conservative investments for all moneys received from the above described real estate and belonging to the party of the first part after deducting all current expenses for the year; that such investment shall be made in the name of Alta M. Woods, party of the first part; that he is to receive all money derived from the sale of the Woods Addition and deposit the same in the banks of El Reno and Lawton, in the name of the party of the first part.

"That the party of the second part shall receive for the management of such investments belonging to the party of the first part thirty-seven and one-half per cent. of the net profits of all such

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investments after deducting all expenses of said business; that on or about the first day of January of each year during the term of this contract the books of the business for the previous year shall be closed and dividends declared and divided between the parties according to this contract; that if the profits upon said investment belonging to the party of the first part are reinvested that such money reinvested is to be managed on the same terms as the original investment.

"And it is agreed further that if at the expiration of ten years from this date either party may wish to sever their business relations, and terminate this contract, that all the property of the Woods Addition remaining unsold shall be appraised by three competent, disinterested parties and that such value shall be a fair cash valuation and it shall be divided between the parties hereto, the first party receiving seventy-five per cent., and the second party twenty-five per cent. of all such unsold property either in lots, stock, notes, mortgages or cash as they may agree, provided, however, that should the parties hereto arrive at a valuation of such unsold property without the intervention of outside parties, a settlement may be made and the appraisement waived.

"It is provided that in the event of the death of the party of the first part this contract is to remain and be in full force and effect, with and against the heirs, executors and legal assigns of the first party.

"That in the event of the death of the party of the second part, there shall be due his estate that portion of twenty-five per cent. of the unsold property which shall correspond to the per cent. of years of this contract which shall have then elapsed."

Subsequently, Mrs. Woods married one Oliver Powers, and on September 26, 1903, Mrs. Powers (formerly Mrs. Woods, but to whom we shall hereafter refer as Mrs. Powers) died.

The plaintiff commenced this action to compel specific performance of the contract by the executor and the heirs of Mrs. Powers. A demurrer was filed to the first count of the petition and sustained thereto, and this ruling is the only matter involved in this appeal.

The petition is quite long, and it would subserve no useful purpose to copy it in full. We shall only refer to those parts that are

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vital to a determination of the question involved. In the first place, what is the effect of the contract between the plaintiff and Mrs. Woods? Counsel for the appellants insists that the contract operated as a conveyance of an interest in the land to the plaintiff. With this contention we cannot agree. It is simply a contract appointing the plaintiff as the agent of Mrs. Powers, which agency was to continue, so far as the land is concerned, for a period of ten years. It is true that the contract also constitutes the plaintiff the agent of Mrs. Powers for the investment of her moneys; but, although the petition contains a count based upon the profits derived from such investments, counsel have waived those matters and are seeking to enforce only that part that relates to the land. The contract itself plainly shows the intention of the parties. It says that the party of the second part (Kimmell) shall have control of the sale of Woods Addition in Lawton, Oklahoma, for a period of ten years from the date thereof, and that he shall receive for such services twenty-five per cent. of the proceeds of such sales, after deducting current expenses of the same, and that such division shall be made on or about the first day of January of each year during the term of the contract. Kimmell was to sell the land, and he was to receive twenty-five per cent. therefor. This, it seems to us was a very liberal commission for such services, and, taking into account the allegation of the petition that the plaintiff is a man of age and business experience and was familiar with his daughter's business affairs, the contract savors of the elements of unconscionableness.

But it is alleged that there were considerations other than those named in the contract which influenced its execution. What were they? Let us briefly notice. The petition alleges that the appellant (Kimmell) loaned his daughter and James R. Wood, her former husband, money with which to prove up on his claim and with which to live on. These allegations only show acts of kindness from a father to his child, as it is not pretended that these loans were not paid back to Kimmell. There is, however, one allegation

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in the petition, as follows: "The facts of plaintiff's relationship, his superior age, business experience, intimate knowledge of her affairs, and previous protective acts and services, furnished in part the motive and consideration on the part of said Alta M. Woods, for said written contract." It is quite likely that these acts of kindness on the part of Kimmell to his daughter and his superior business experience, etc., influenced in part the making of the contract, and these same considerations would have had an important bearing in giving a similar contract to one who was not a near relative. But these considerations cannot operate to confer upon Kimmell rights which the language of the contract itself does not import. The relation being that of principal and agent, the death of Mrs. Powers terminated the agency. In Bishop on Contracts, sec. 340, it is said: "The death of either party terminates the agency; that of the agent, because a dead man can perform no act; that of the principal, because his earthly existence has ceased, and in the nature of things there can be no agent without a principal. Even though the death of the principal is unknown to the agent, so that the latter executes in good faith what he believes to be a continuing agency, such execution is void." And see the Am. & Eng. Enc. of Law (2nd Ed.) page 1022: "It is a well established rule of the common law that the death of the principal puts an end to the agency, when the authority is not coupled with an interest, and no act of agency subsequent thereto is binding upon the estate of the principal, for no one can do an act in the name of one who is dead"—citing authorities.

What interest could Kimmell possibly have in the land itself? The petition alleges "that on October 17, 1902, Alta M. Woods (Powers) was the owner in fee simple, and in possession of the unsold portion of the north half of the south half of section thirty-one, in township two north, of range eleven west I. M., in Comanche county, Oklahoma, which land was platted and generally known and described as the Woods Addition to Lawton, Oklahoma, which property was then of the value of about \$73,395, and

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she continued to be such owner and in possession of the same up to the time of her death hereinafter mentioned." The plaintiff here states that, on the date the contract in question was entered into, the land was platted, and also that Mrs. Powers continued to be the owner of all of the land referred to in the contract until the time of her death. Hence the plaintiff in this case did not sell a single lot or foot of ground under the contract, and, as he did not claim that he paid any money or other valuable consideration for the contract, we cannot perceive how he has an interest in the land which should be recognized. He does not even allege that he expended money in preparing the addition for sale or in attempting to make sales. His allegation as to what he did under the contract is "that he has duly performed all the conditions on his part required by said contract; that immediately upon the execution and delivery of said contract he entered upon the performance of his duties and obligations thereunder, that he gave his entire time and attention to the management and control of said business," etc. The plaintiff may have given his time and attention, but he sold no lots. Under the contention of the appellant, he could have done nothing for ten years, and then exacted a one-fourth interest in the entire addition. The contract will not be so interpreted. There was a remote contingency that there might be some lots unsold at the end of ten years, and, if so, the appellant would be entitled to a one-fourth interest in them, or the proceeds therefrom; but that feature of the contract contemplated an honest effort to sell the addition. The appellant could not sit quietly by for months, and then, upon the death of the principal, claim this clause as giving an interest in the lots unsold. Equity will only give him that which, in justice, he is entitled to. The appellant may have expended his time in making investments for Mrs. Powers and in looking after the same, but, as to such services, the contract provides a different compensation, and the presumption is that he has received it.

Nor can the clause in the contract to the effect that, in the

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event of the death of Mrs. Powers, the contract is to remain and be in full force and effect, be interpreted as continuing the contract of agency after the death of Mrs. Powers. When she died, the interests of the plaintiff, on the one hand, and the heirs of Mrs. Powers, on the other, became fixed. Kimmell could recover that which was due him, if anything, under it, but he could not authoritatively act longer as agent for his principal who was dead.

The petition presents no grounds for equitable relief, nor does it state an action at law for damages.

The judgment of the lower court is hereby affirmed, at the cost of the appellant.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

SPAULDING MANUFACTURING COMPANY v. W. D. KENDALL, *Treasurer*, AND S. A. ELLIOTT, *Sheriff*, of Roger Mills County.

(Filed September 5, 1907.)

(91 Pac. 1031.)

1. **TAXATION—Property Subject—Assessment in Two States.** Personal property, assessed in another state on January 1st of a given year, and brought in and acquiring a situs in this territory prior to the first day of March of the same year, is assessable and liable for taxes for that year in Oklahoma.
2. **SAME.** The territory has the right to tax property brought into the territory for the same year that it has paid taxes in another state or territory.

(Syllabus by the Court.)

Error from the District Court of Roger Mills County; before Clinton F. Irwin, Trial Judge.

Affirmed.

D. B. Welty, for plaintiff in error.

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Opinion of the court by

BURFORD, C. J.: On the first day of March, 1905, The Spaulding Manufacturing Company, of Grinnell, Iowa, was the owner of a stock of vehicles, buggies, and carriages in Sayre, Roger Mills county, Oklahoma, and said property was assessed for the year 1905 in that county. By the laws of the state of Iowa, such property is assessable for taxation as of the first day of January of each year. The property in question, with other property, was assessed in Poweshiek county, Iowa, for the year 1905, before it was removed to Oklahoma, and at the time of the trial the first half of the taxes had been paid for 1905 in the state of Iowa. The plaintiff in error claims exemption from taxes on its property in Oklahoma for the year 1905, for the reason that it has been assessed and is liable for taxes on the same property for the same period in another state. This is the sole issue in this case. The district court of Roger Mills county held that the property was liable for taxes, and rendered judgment against the plaintiff in error for costs; hence this appeal.

Our revenue laws (section 5931, Wilson's Statutes 1903) require that "all taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof on the first day of March of each year, as soon as practicable on or after the first Monday in March, including all property owned on the first day of March of that year." Under this statute the property in question was assessable for the year 1905 in Roger Mills county, and there liable for taxation.

Counsel for plaintiff in error contends that, if the property in question is at all liable for taxes in Oklahoma, it must be under section 5919, Wilson's Statutes 1903, which is a part of what is known as the "transient property act" of 1895, and herein lies the error of his position. That law only includes transient property which is brought into the territory after the first day of March and before the first day of September of any year; that is, after the time for assessment under the general law has expired. This prop-

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erty was in the territory and had acquired a situs prior to the first day of March of the year in which it was assessed, and comes within the provisions of the regular revenue laws. In the case of *Collins et al. v. Green*, 10 Okla. 244, 62 Pac. 813, Mr. Justice Burwell, speaking for the court, said: "A state or territory has the right to tax property brought into it, even though such property may have been taxed for the same year in the state or territory from which it came. The proposition is too well settled by decisions and text writers to admit of discussion." This is the established law, and is applicable to this case, and decisive of it under the facts appearing in the record. The questions argued and authorities cited by counsel in his brief have no application to the case made by his proof.

The judgment of the district court is affirmed, at the costs of the plaintiff in error.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

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(Filed September 5, 1907.)

(91 Pac. 689.)

1. **COURTS—Records—Amendment by Nunc Pro Tunc Order.** On proper application and notice, a court may, by nunc pro tunc order, cause its records to speak the truth and be amended so as to record any part of the proceedings had in a cause which by inadvertence or mistake the clerk has omitted to record.
2. **JURY—Trial by Jury—Cannot be Waived, When.** One who is charged with a crime triable by a jury at common law is required by our statute to be tried by a jury, and cannot waive such right. A judgment of conviction, pronounced by a court upon a plea of not guilty, without the intervention of a jury is void; and a person imprisoned upon such judgment is entitled to his discharge upon habeas corpus.

(Syllabus by the Court.)

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Original in the Supreme Court.

Petitioner discharged.

Geo. T. Webster, for petitioner.

M. L. Holcombe, Co. Att'y, for respondent.

Opinion of the court by

BURFORD, C. J.: The petitioner was convicted in the probate court of Custer county for a violation of the law for the protection of game, and was sentenced to pay a fine of \$100 and costs, and to stand committed to the county jail in default of payment. He appealed to the district court, but there dismissed his appeal before trial, and the cause was remanded to the probate court to be executed. The defendant upon arraignment pleaded not guilty, waived a jury, and tried the case to the court.

The original record of the judgment omitted to state that the defendant was ordered committed to jail in default of payment of the fine adjudged against him, or that he waived a jury trial. Subsequently the court, on motion of the county attorney, found that the defendant did, on arraignment, waive a jury, and that in rendering the judgment and pronouncing judgment the court did in fact adjudge that upon failure to pay the fine and costs that the defendant be committed to the county jail of Custer county until the fine and costs should be paid, or until he had served one day for each two dollars of said fine and costs, and the court ordered *nunc pro tunc* that the record be made to speak the truth, which was accordingly done. The petitioner contends that that judgment so entered and recorded is void and of no effect, for the reason that the record was amended after the expiration of the term of court at which the judgment was rendered, and a number of authorities are cited sustaining the proposition that the clerk cannot amend his records after the term at which the proceedings were had. We find no fault with the rule as here contended for, but it has no application to the facts in this case. The orders, judgments, and proceedings of a court of general jurisdiction are required to be recorded

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by the clerk of the court. The failure of the clerk or recording officer to make such record does not vitiate the proceedings. The clerk may, at any time during the term at which the proceedings are had, correct, amend, or supply omissions to make the record speak the truth; and the court may, at any time, upon proper application, from the memory of the presiding judge or upon proper showing, by appropriate order *nunc pro tunc* cause its records to recite the truth, and may supply any omission from its records; and this may be done in a criminal as well as in a civil cause. Such record, when so supplied, relates to the time when the proceedings were in fact had, and may make valid that which was apparently defective. *Wright v. Nicholson*, 134 U. S. 136, 33 Law. Ed. 865; *Gonzales v. Cunningham*, 164 U. S. 612, 41 Law. Ed. 572. *Hyde v. Curling*, 10 Mo. 359; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 3 McLean (U. S.) 379; *State v. Bilansky*, 3 Minn. 246; Bishop's New Crim. Proc., § 1345. The proceedings had before the probate court for the purpose of determining what judgment was in fact rendered, and its finding and order for a *nunc pro tunc* order perfecting the record, are strictly in accord with recognized practice, and conform to what is required by due process of law. We are not permitted in this kind of a proceeding on habeas corpus to review or correct errors, and we need not decide whether the proceedings were in every respect free from error. The court had power to make its records speak the truth; it had jurisdiction of the parties and of the subject-matter, and it proceeded in the manner recognized by law. The proceedings are not void and may be enforced.

The next contention is that the judgment is void for the reason that the petitioner was entitled to a jury trial, and that he could not lawfully waive such right, and that a judgment rendered by the court upon a plea of not guilty, without the intervention of a jury, is void. The statutory provisions involved are as follows: Section 5142, Wilson's St. 1903: "No person can be punished for a public offense except upon legal conviction in a

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court having jurisdiction thereof." Section 5151: "The procedure of practice and pleadings in the district courts of this territory in criminal actions or in matters of a criminal nature, not specifically provided for in this chapter, shall be in accordance with the procedure, practice and pleadings of the common law, and assimilated as near as may be with the procedure, practice and pleadings of the United States or Federal side of said court." Section 5158: "No person can be convicted of a public offense unless by the verdict of a jury accepted and recorded by the court, or upon a plea of guilty, or upon final judgment for or against him upon a demurrer to the indictment, or upon a judgment of a police or justice's court in cases in which such judgment may be lawfully given without the intervention of a jury or grand jury." Section 5434: "An issue of fact arises, first, upon a plea of not guilty; or, second, upon a plea of a former conviction or acquittal of the same offense." Section 5435: "Issues of fact must be tried by a jury." Section 5436: "If the indictment is for a felony, the defendant must be personally present at the trial, but if for a misdemeanor not punishable by imprisonment, the trial may be had in the absence of the defendant. If, however, his presence is necessary for the purpose of identification, the court may, upon the application of the district attorney, by an order or warrant, require the personal attendance of the defendant at the trial."

This brings us to the question: Can a defendant, charged with a crime and entitled to a jury, waive the jury and try the case to the court? Upon this question a casual examination of the decisions would lead to the impression that there is considerable conflict. But a careful and discriminating review discloses the fact that the decisions holding that the accused may waive a jury are based upon statutory or constitutional provisions. A great many of the states of the Union have constitutional or statutory provisions to the effect that a defendant in a criminal cause shall be tried by a jury, unless he waive the jury and con-

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sent to trial by the court. We believe the authorities are practically unanimous in holding that a jury cannot be waived, unless such waiver is authorized by statute. In Hughes on Criminal Procedure, §2979, the author says: "A jury cannot be waived in a felony case, even by agreement or consent of the defendant. It is jurisdictional, and consent can never confer jurisdiction. The defendant may waive his right to a jury trial in a prosecution for a misdemeanor, and be tried by the court instead of a jury, where such waiver has been authorized by statute, and the courts have upheld the constitutionality of statutes providing for such waiver in misdemeanor cases." In Bishop's New Criminal Procedure, §893, it is said: "One form of waiver is where, authorized by statute and the constitution not withholding any needful jurisdiction from the tribunal, the defendant consents to be tried by the court without a jury. He cannot afterward complain."

Rapalje, in his Criminal Procedure (section 150), goes more fully into the question, saying: "There are few questions of law upon which the courts are more evenly divided in opinion than the problem whether it is legally competent for a defendant in a prosecution for felony to waive a trial by jury and consent to be tried by the court, unless, as in the case in some of the states, the constitution allows a jury to be waived in such cases as the legislature may direct. Where the constitution so provides, the legislature alone has the power to determine in what classes of cases a jury trial may be waived. The words 'prescribed by law,' in the constitution, are held to look to actual legislation upon the subject, and, in the absence of a statute, to impliedly prohibit the granting of a permission by the court to the defendant to dispense with a jury. And, a statute having provided a certain way of waiving a jury, that way must be pursued; a waiver can be had in no other. But, where the constitution is silent on this matter, the decisions are at variance as to whether a legislative authorization is effectual to enable the accused to waive a jury. Upon the affirmative side of this question it is held in Alabama and Indiana that the failure

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to demand the privilege of a jury trial is a waiver of it. In Arkansas, in a trial for assault or other misdemeanor, by agreement of the parties, the defendant may be tried by a jury of less than twelve, or by the court alone, but mere waiver of the requisite number by failing to object to less will not authorize a trial by less than twelve. In Connecticut, a statute providing that in all prosecutions the party accused, if he should so elect, might be tried by the court instead of by the jury, and that in such cases the court should have full power to try the case and to render judgment, was held not to conflict with the constitution. In Georgia, a defendant may waive the jury altogether, or the full number. In Illinois, a party under indictment for a felony, after pleading not guilty, may waive his constitutional right to a trial by jury, and a trial and conviction by the court alone is valid; but in a capital case the accused will not be presumed to have waived any of his rights, although he has power to waive them all. So, also, in misdemeanor cases, the jury may be waived by consent. In Iowa, if the defendant consents, eleven jurors may try the case; but he cannot waive a jury altogether and submit to a trial by the court. In Kansas, the defendant may waive or insist on trial by jury at his option. In Michigan, a waiver of jury trial in a prosecution for assault and battery before a justice of the peace is binding. So, also, in Kentucky, Missouri, and Nevada, in misdemeanor cases the defendant may consent to be tried by less than a full jury. And, in New York, an infant accused of petit larceny may waive his rights to trial by jury and elect to be tried by a court of special sessions. In Ohio, where the offense is a petty one triable in the police court, a failure to demand a jury is a waiver. In Texas, a waiver may be effected by the entry of a plea of guilty. In Wisconsin, the defendant was held to have waived his right of jury trial by obtaining a change of venue." In section 151 the author reviews the opposite holdings, and says: "Notwithstanding the many ably reasoned opinions to be found in the cases collated in the preceding section, an examination of the decisions holding

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the contrary doctrine has led the writer to the conclusion that the weight of authority, as well as the better opinion, is that, in prosecution for crime other than minor misdemeanors and petty offenses, the defendant cannot waive his right to trial by jury or consent to a trial by a less number than twelve. A trial without a jury is a trial without jurisdiction. The state and the defendant cannot agree upon the facts and submit them to the judge for his decision. Some of the cases merely decide that the waiver is ineffectual in cases of felony; but it is difficult to see why the same rule should not obtain in cases of grave misdemeanors entailing heavy punishment in the event of conviction. Even the issue on a plea of former trial must be decided by a jury, and defendant's consent will not dispense with such trial. In Michigan, a conviction for murder was had, one of the jurors being an alien, which was unknown to the defendant until after verdict, and, his motion for a new trial being refused, it was held that the verdict was void; that the defendant could neither expressly nor impliedly waive his right to a jury of twelve men such as is meant by the state constitution—a jury of his countrymen. The error into which those who hold the opposite view fall seems to be twofold: First. They ignore the distinction between civil suits, involving property rights, and criminal prosecutions, involving the right of life or liberty. Second. They treat the mode of trial by jury as though its sole purpose and effect was to protect the particular suitor or the individual defendant; as if its use or disuse were a matter of purely personal right and concerned only the litigants themselves. For, as Blackstone says, 'the king has an interest in the preservation of all his subjects.' The life and liberty of the citizen is a matter of supreme importance to the state, and it should not allow him to throw either away by failure, intentional or unintentional, to take advantage of the constitutional safeguards in a criminal trial."

In Wharton's Criminal Pleading and Practice (8th Ed.) §733, discussing consent and waiver, the author says: "But such

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consent does not, it has been held, operate to legalize a trial by eleven instead of twelve jurors; nor can a defendant, without an express statutory authority, waive his right to a trial by jury on a plea of not guilty." In the law of Crimes and Criminal Procedure, by Hocheimer, it is stated: "Statutes authorizing the submission of a case to the determination of the court are valid; but, in the absence of statutory provision, the parties cannot by consent confer upon the court power to determine the facts." Mr. Clark, in his Criminal Procedure, says (p. 434): "The right of every person charged with crime to a trial by jury, has from the earliest period existed at common law. It was recognized and secured to the English people by the Magna Charta and with us it is guaranteed by our federal and state constitutions. The language of the different provisions varies to some extent; but their object and effect is the same, namely, to secure to every person charged with a crime the same right to a jury trial, and only the same right, as had always existed at common law. No new right is conferred; but the common-law right is guaranteed, so that the legislature cannot take it away nor impair it. The legislature may regulate the mode of trial by jury, provided it does not deprive the accused of his substantial common-law rights; but it cannot take away a single one of these rights. At common law a person accused of petit offenses, such as vagrancy, disorderly conduct, violation of municipal ordinances, and trivial breaches of the peace, of which justices of the peace and police magistrates had jurisdiction, had no right to demand a trial by jury, and by the weight of authority he has no such right under the constitutional guaranty; for, as we have seen, it was only intended to guarantee the same right as had always existed at common law. Whether or not the right of trial is a right which the defendant can waive is a question upon which the authorities are conflicting. Some of the courts have held that a jury may be waived in all cases, provided there is a statute authorizing the court to try the case without a jury; that the constitutional right to a trial by jury is not infringed when the ac-

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cused may have it or not at his election. Many of the cases so holding were cases of felony, but most of them were cases of misdemeanor, and it is probable that the court in some of the latter cases did not intend to lay down any such rule for cases of felony. Many of the cases hold that trial by jury cannot be waived in prosecutions for felony. It is difficult to understand how there can be any distinction in this respect between a prosecution for a felony and a prosecution for such a misdemeanor as at common law entitled the defendant to a jury trial. It would seem in reason that if a jury cannot be waived in one it cannot be waived in the other, and that if it can be waived in one it can be waived in the other. The grade of the crime should be immaterial, provided it is such a crime as entitled the defendant to a jury trial at common law; for, as we have seen, the constitutions guarantee the same right as existed at common law. If, therefore, a jury trial cannot be waived in one case in which it was necessary at common law, it cannot in reason be waived in another. Where the constitution or a statute expressly requires a jury trial, and does not merely give the accused the right to such a trial, a jury can in no case be waived; for it is intended to protect the state as well as the defendant. Where the right to a jury trial is given by statute in cases which could be tried without a jury at common law, as in prosecutions for petit misdemeanors before inferior tribunals, the right may, of course, be waived."

It is clear from the foregoing authorities that, if one charged with a crime would have been triable by jury at common law, then his right to a jury trial is guaranteed under the constitution of the United States. Our statute contains the same guaranty. Section 5434: "An issue of fact arises, first, upon a plea of not guilty. * * * Issues of fact must be tried by a jury." Section 5158: "No person can be convicted of a public offense unless by verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon final judgment for or against him upon a demurrer to the indictment, or upon a judgment of

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a police or justice's court in cases in which such judgment may be lawfully given without the intervention of a jury or grand jury." The last clause of this section evidently refers to the class of petty misdemeanors and violations of municipal ordinances which were triable at common law without a jury, so that our statute prescribes the same rule which is found in the authorities cited, and, there being no statute in this territory which authorizes a defendant in a criminal case to waive a jury trial, it follows that such a case cannot be tried upon a plea of not guilty without a jury, unless it comes within the class of cases in which no jury was required at common law, and which, in our statute, are designated as cases triable in a justice or police court, in which judgment may be lawfully given without the intervention of a jury.

Does the charge against the petitioner come within these classes? He was charged by information before the probate court with a violation of the game law, in shipping three thousand quail during the closed season, in violation of law. He pleaded not guilty. The court found him guilty, and assessed against him a fine of \$100 and \$88.60 costs of prosecution, and ordered him committed until the fine and costs were paid, or until he should serve one day for each two dollars of such fine and costs. This prosecution was under section 3079, Wilson's Statutes 1903, which provides a penalty for its violation by a fine of not less than fifty nor more than five hundred dollars and costs of the prosecution. Section 5578, Wilson's Statutes, further provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine. This is a general statute and applicable to all criminal prosecutions where a fine may be imposed as a penalty for a crime. Petty misdemeanors at common law were unimportant, trifling offenses, such a vagrancy, disturbing the peace, desecrating the Sabbath, profanity, and kindred offenses. We think the offense charged against the petitioner here rises above the dignity of a

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petty misdemeanor and entitled him to a trial by jury, and, not having had trial by jury, the judgment cannot be enforced, and that his imprisonment thereunder was illegal.

The petitioner is ordered discharged from the commitment, and, as he is now on bail to respond to such order as this court may make, that he appear at such time as shall be designated by the probate court to answer the charge in said information, and for such further proceedings in said cause as may be in conformity to law.

Irwin, J., absent; all the other Justices concurring.

KAW CITY MILL & ELEVATOR COMPANY V. PURCELL MILL & ELEVATOR COMPANY.

(Filed September 5, 1907.)

(91 Pac. 1022.)

SALE—Offer and Acceptance—Immaterial Variances. An offer of sale of personal property and its acceptance must receive a reasonable construction, and the proposer is bound by its acceptance in that sense. Immaterial variances between the offer and its acceptance will be disregarded.

(Syllabus by the Court.)

Error from the Probate Court of Kay County; before R. L. Howsley, Trial Judge.

Affirmed.

J. F. King, for plaintiff in error.

Sam K. Sullivan, for defendant in error.

Opinion of the court by

HAINER, J.: This was an action brought by the defendant in error, plaintiff in the court below, against the Kaw City Mill and Elevator Company, to recover damages for the nonperformance of a contract alleged to have been entered into between said parties for the purchase of a quantity of corn for a stipulated

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price. From a judgment for the plaintiff in the court below, the defendant appeals.

There is but one question for determination by this court, and that is whether the facts, as shown by the evidence, were such as to constitute a contract between the parties. The evidence upon this point is presented by an agreed statement of facts, which is as follows:

"It is hereby stipulated and agreed by and between the said plaintiff and the said defendant as facts in said cause, that on the 11th day of January, 1904, the said plaintiff sent the following telegram from its place of business in Purcell, I. T., to the defendant, which was delivered to said defendant, in due course, at its place of business in Kaw, Oklahoma, on that date:

"Purcell, I. T., Jan. 11, 1904.

"To Kaw City M. & E. Co., Kaw City, O. T.: Accept affright mixed chronic basis Kaw rush same forward confirm. Purcell Mill & Elevator Co.'

"And which telegram was in what is known as Robinson's code, used among grain men and elevators, and interpreted into the English language is as follows: 'Accept four cars, mixed ear corn 34½ cts. per bu. basis Kaw, rush same forward, confirm.' That the words 'basis Kaw' in this telegram means that the plaintiff will pay freight on said corn equal in amount to the freight thereon from Kaw, Oklahoma, regardless of where said corn might be shipped from; that on the same date and upon receipt of said telegram by it, and in reply thereto, a telegram was sent by the defendant to the plaintiff in the same code, a copy of which is as follows:

"Kaw City, Jan. 11, 1904.

"To Purcell M. & E. Co., Purcell: Confirm affright, ear corn, chronic f. o. b. Burbank. Kaw City M. & E. Co.'

"Which telegram was on the same date received by plaintiff, and which being interpreted is as follows: 'Confirm, four cars ear corn 34½ cents per bu. f. o. b. Burbank.' That immediately on the sending of said telegram by plaintiff and on the same day the plaintiff wrote to the defendant the following letter:

"Purcell, I. T., Jan. 11, 1904.

"Kaw City Mill & Ele. Co.,

"Kaw City, Okla.

"Gentlemen: We are in receipt of message from our Mr.

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Orme, stating you offer us four cars mixed corn at 34½c. We wired you in reply "Accept four cars mixed ear at 34½c basis Kaw, rush same forward." If you can get this corn from your Burbank station it will suit us just as well.

"Please let same come forward as we are needing it badly.

"Respectfully,

"PURCELL MILL & ELEVATOR Co."

"Which letter was duly sealed up and addressed to defendant at Kaw, Oklahoma, its place of business, and deposited on that date by plaintiff in the post office at Purcell, I. T., postage prepaid, and received in due course of mail by the defendant. That immediately on the sending of said telegram by defendant on the same day, to-wit, Jan. 11, 1904, the said defendant wrote to said plaintiff the following letter:

"Kaw City, Oklahoma, Jan. 11, 1904.

"Purcell Mill & Ele. Co.,

"Purcell, I. T.

"Gents: We have your account sales for cars as follows: 20331, 31012 & 11494. But you leave out cars No. 1172 & 10340, former shipped Dec. 12, latter Dec. 22, & both prior to the 11494 which was shipped Dec. 30. Please look this matter up. These are the first cars we have had run short. We now have a new pair of Hopper scales and will have a positive check in future, but as a rule in the past returns have shown from 10 to 35 bu. over run. We wired you in reply to yours of today confirming f. o. b. Burbank, while I think rate is the same, still I will not guarantee Kaw rate. Tariffs for Burbank are not thoroughly settled. If you do not want the 4 cars that way wire at once on receipt of this. Yours,

"KAW CITY MILL & ELEVATOR Co."

"Which letter defendant sealed up and addressed the same to said plaintiff at Purcell, I. T., its place of business, and deposited the same on said date, postage prepaid, in the post office at Kaw, Oklahoma, and which letter plaintiff received in due course of mail. That on January 20th, 1904, the said defendant wrote to the plaintiff, the following letter:

"Kaw City, Oklahoma, Jan. 20, 1904.

"Purcell Mill & Elev. Co.,

"Purcell, I. T.

"Gents: We had your wire of the 19th, offering 37c for

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corn, also have your letter of the 19th before me just now. Your price is not in line at present, so can't sell you any. You speak of us wiring when we have corn. We have corn all the time, when prices are in line. The 4 cars ear from Burbank we have as yet been unable to get cars. We have one that we expect to be able to get out in a day or two, and will have others follow as quickly as we can. Yours truly,

“KAW CITY MILL & ELEVATOR CO.

“By H. E. GUY.”

“And on said date sealed said letter up and addressed the same to the plaintiff at Purcell, I. T., and deposited the same, postage prepaid, in the post office at Kaw, Oklahoma, which was received by plaintiffs in due course of mail.”

We think the trial court was fully justified in holding that the telegrams and letters, as shown by the agreed statement of facts, constituted a contract of sale, and that no other reasonable construction could be placed upon the intent of the parties. The rule is clearly stated in the 24 Am. & E. Enc. Law (2d Ed.) 1032, where it is said: “Immaterial variances between the offer and its acceptance may be disregarded. An offer must receive a reasonable construction, and the proposer is bound by its acceptance in that sense.” We have carefully examined the authorities cited by plaintiff in error, upon which a reversal is asked. These authorities undoubtedly correctly state the law, but they are not applicable to the facts of this case. The undisputed testimony, in our opinion, shows that there was an absolute and unconditional acceptance by the plaintiff in error, and the subsequent letters of the plaintiff in error clearly indicate an intention upon its part to comply with the contract; and we are unable to perceive on what theory it failed to perform the contract, unless it was on account of the fact that the price of corn had advanced between the time of the acceptance of the proposition and the time that cars could be secured in which to make the shipment. We think this is a clear case of the breach of a just, valid, and binding obligation, and that the defendant in error was entitled to recover such dam-

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ages as it sustained by reason of the nonperformance of the contract.

There is no merit in the contention of the plaintiff in error, and the judgment of the court below is affirmed.

Irwin, J., absent; all the other Justices concurring.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *a Corporation*,
v. L. W. MCGIVNEY.

(Filed September 5, 1907.)

(91 Pac. 693.)

1. **CARRIERS—Injury to Freight—Connecting Carriers—Presumptions.** Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier.
2. **SAME—Initial Carrier—Duty of Delivery.** If a common carrier accepts freight for a place beyond his usual route he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.
3. **SAME—Rights of Shipper—Information of Injury.** If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, the shipper may demand satisfactory information from the first carrier that the injury or loss did not occur on its line, and if such carrier fails to furnish within a reasonable time, the proof in its possession or its control, tending to show that it was not responsible for the injury or loss, it will be held liable therefor, regardless of whether or not it was in fact responsible for such injury or loss.
4. **SAME.** The right of a shipper, under section 511 of the Statutes of Oklahoma of 1893, to demand of a first carrier proof that loss of or injury to freight addressed to a point beyond its usual route, where it has been delivered to a connecting carrier, to the effect that the loss or injury did not occur on its line, does not prohibit a shipper in the first instance, without such demand, from bringing an action for damages for an alleged loss or injury.
5. **SAME.** The purpose of the statute is to put the shipper in possession of the information which is in the possession or under

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the control of the first carrier so that he may determine what carrier caused the injury, and obtain satisfaction therefor without being compelled to bring a multiplicity of actions.

6. **APPEAL—Insufficient Evidence—Reversal and Dismissal.** Where a plaintiff fails to offer any evidence in support of an allegation of a petition which, if proven, would authorize a recovery, and the case is appealed to this court, such allegation, for the purposes of the appeal, will be deemed to have been waived; and while, in case of a reversal and remanding for a new trial, evidence might, on such second trial, be offered in support thereof, this court will not order a new trial for the purpose of affording such opportunity, as it is the duty of a litigant to offer all of his evidence at the first trial at which the law permits him to do so.

(Syllabus by the Court.)

Error from the District Court of Grant County; before James K. Beauchamp, Trial Judge.

Reversed and dismissed.

Flynn & Ames, and R. A. Kleinschmidt, for plaintiff in error.
Mackey & Mackey, for defendant in error.

Opinion of the court by

BURWELL, J.: The appellee, L. W. McGivney, shipped a car of corn from Salt Fork, Oklahoma, to Henrietta, Texas, according to the bill of lading as follows:

“From Salt Fork, Oklahoma, to Sherman, Texas, over the St. Louis and San Francisco Railroad Company; from Sherman, Texas, to Fort Worth, Texas, over the Houston and Texas Central Railroad Company, and from Fort Worth, Texas, to Henrietta, Texas, over the Fort Worth and Denver City Railroad Company.”

There was a delay in delivery, and, when the car finally reached Henrietta, over the Fort Worth & Denver R. R. Co., it was so damaged that the consignee refused to receive it. The appellee made a claim to the Fort Worth & Denver company, which was by that company referred to the appellant company and investigated by it, and finally the appellee brought suit for the value of the corn.

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There is absolutely no evidence in the record that in the slightest degree indicates the corn was damaged while in transit over the appellant's road; and the fact that the car was received by a connecting line carries with it the presumption that it was in good condition when delivered by the appellant to such connecting road. The appellee has proceeded upon the theory that, because the appellant company received his corn for shipment and loss occurred, it is primarily liable to him without regard to negligence on the part of appellant. Such is a mistaken theory of the law. Where a common carrier receives freight for transportation to a point beyond its line, under a contract that it will deliver it to a connecting carrier and will not be liable for damages not occurring on its own line, and the goods are received by the connecting carrier without objection, the presumption of law is that the freight was in the same condition when delivered to the connecting carrier as it was when received by the initial carrier; and, if the freight is damaged when it reaches its destination, in the absence of proof, the presumption is that the damages occurred while the property was in the possession of the last carrier.

This identical question was decided by the supreme judicial court of Massachusetts, in the case of *Farmington Mercantile Co. v. Chicago B. & Q. R. Co.* (Mass.) 44 N. E. 131. Mr. Justice Holmes, the present member of the supreme court of the United States, participated in the opinion, although it was written by Mr. Justice Allen. The court said:

"When goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier."

The supreme court of Alabama, in the case of *Louisville & N. R. Co. v. Jones* (Ala.) 14 So. 114, said:

"Where goods are delivered to a carrier for transportation to a point beyond its own line under a through bill of lading, which stipulates against liability for injury beyond its own line, and the goods are in a damaged condition when delivered by the con-

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necting carrier to the consignee, the presumption is that the receiving carrier delivered them to the connecting carrier in good condition, and the presumption must be overcome before the consignor can recover for such damage from the receiving carrier."

In 6 Cyc. 490, §7, the law is declared as follows:

"Under the American rule that, in the absence of partnership relations or contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred. To render the first carrier liable, it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in damaged condition. The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession. But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier, that the goods were still in the condition in which they were received by the first carrier. Indeed the weight of authority seems to be in support of the general proposition that if the goods are delivered by the last carrier in damaged condition, the presumption arises without further evidence that the damage occurred while in the possession of the last carrier, and that the burden is upon him to prove that they were in the damaged condition when received by him, the double presumption being entertained that they were accepted in good condition by the first carrier, and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines."

Under the law a common carrier is not bound to receive goods from a connecting carrier for transportation which are damaged, or if it receives them it is entitled to have the receipt given therefor, or the records of shipment show the real condition of the goods when it received them; and the presumption is that a second carrier, or any carrier, will not receipt a former carrier for goods as being in good condition when they are already damaged. It is because of the right of a subsequent carrier to have the record

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speak the truth that the law, in the absence of a record or proof to the contrary, presumes that goods or freight was in good condition when received from a connecting carrier. The legislature of this territory has recognized the rule stated above, as will be seen from the following sections of the Statutes of Oklahoma of 1893:

“Sec. 510. If a common carrier accepts freights for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.”

“Sec. 511. If freight, addressed to a place beyond the usual route of the common carrier who first received it, is injured or lost, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.”

From section 510 it will be seen that the liability of the first carrier ceases when it delivers freight to a competent connecting carrier, carrying freight in the direction of the destination thereof. And section 511 provides that where freight is received by a common carrier and its destination is beyond the usual route of the carrier first receiving it, and such freight is lost or injured, the first carrier must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in its charge, and if it fails to furnish such proof it will itself be liable therefor.

It is insisted that the word “demand” meant by the statute is a demand for payment for the loss. We do not think so. The statute, recognizing that the first carrier can easily furnish proof as to whether or not the loss occurred on its line, has provided that it must furnish the shipper with satisfactory proof within a reasonable time that it was not responsible for such loss. The shipper, under the statute, may go to the first carrier and request it to furnish proof that the injury did not occur on its line, so that it

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may be able to locate the carrier responsible for the injury and sue it if necessary; but, if the first carrier fails to furnish the proof within a reasonable time, showing that the loss did not occur on its line, then it will be held liable therefor, regardless of whether or not it was, in fact, responsible for the injury to the freight. And under this section the shipper is entitled to full and complete information regarding the shipment, so far as known to the first carrier, which could be used by such carrier in defending an action for damages therefor; that is, to all of the proof in its possession or under its control at the time that would tend to show that the first carrier was not responsible for the loss. The penalty for failing to furnish such proof is absolute liability on its own part to pay the damage sustained. It must, however, be observed that this statute is not intended to prohibit one who has sustained loss by reason of injury to freight from suing the first carrier without such demand; but, when he does so, the burden is on the shipper to show by a preponderance of the evidence that the injury was the result of the negligence of such first carrier. The statute was enacted primarily for the benefit of the shipper, but, when he fails to avail himself of its conditions in the first instance, and sues the first carrier without such demand, he cannot then take advantage of its provisions after the first carrier has been put to the trouble and expense of defending an action against it. The statute is intended to require the first carrier to furnish to the shipper on demand that information which, in the absence of the statute, the shipper could only compel in an action against it, or some other connecting carrier.

The appellant has made other assignments of error, such as the barring of the cause of action by reason of the statute of limitation, and misdirecting the jury on questions of law, but it is not necessary to discuss them, as, under the record presented, the plaintiff must fail to recover. There are some allegations of the petition which, if proven, would make the appellant liable in damages; but, as there was absolutely no evidence offered as to them

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so far as this appeal is concerned, they are deemed to have been waived. If the case were reversed and remanded by reason of error committed in the trial below on those issues which were litigated, the appellee would not be precluded from offering evidence on another trial, under any proper allegation of his petition. But when, on the trial of a case in the lower court, a party omits to offer evidence on an issue formed by the pleadings, and this court finds that he must fail under the evidence offered, and that he cannot recover on any of the issues tried, this court will not remand the case for a second trial under the theory that he might possibly make out a case or defense under allegations of his petition or answer which he did not support by evidence on the former trial. It is the duty of a party on a trial to litigate his whole case, and each and every part thereof, at the first opportunity, and, if he fails to do so, he cannot complain if the appellate court deems those issues not litigated as waived.

The judgment of the lower court is hereby reversed, at the cost of appellee, and the cause dismissed with prejudice.

Irwin, J., absent; all the other Justices concurring.

J. H. BUTTS AND J. A. BUTTS V. EMMA E. ANDERSON AND H. H. ANDERSON.

(Filed September 5, 1907.)

(31 Pac. 906.)

NEW TRIAL—Grounds—Death of Stenographer. The district court is only authorized to grant new trials for the causes, in the manner, and within the time set forth in the statute, and it is manifest and material error to grant a new trial for the reason the complaining party is unable to procure anyone who can transcribe a deceased stenographer's shorthand notes of the proceedings on the trial.

(Syllabus by the Court.)

J. H. Butts *et al.* v. Emma E. Anderson *et al.*

Error from the District Court of Kingfisher County; before C. F. Irwin, Trial Judge.

Reversed and remanded.

P. S. Nagle and W. A. McCartney, for plaintiffs in error.

D. K. Cunningham, for defendants in error.

Opinion of the court by

BURFORD, C. J.: The plaintiffs in error brought their action in the district court of Kingfisher county, Oklahoma, to recover from the defendants in error upon a written contract for building material furnished by them to the defendants, and for the enforcement of a mechanic's lien against the real estate upon which the building material had been used. The defendants in error answered, first, by a general denial, and, second, by alleging that the plaintiffs in error were dealers in lumber and building material at Kingfisher, Oklahoma, and as such dealers were members of a pool or unlawful agreement with other lumber dealers, in restraint of trade, and for such reason were not entitled to recover in said action. To this answer the plaintiffs replied by general denial. On March 11, 1904, the cause was tried to the court, a jury having been waived by both parties. After hearing the evidence the court found for the plaintiffs and against the defendants, and rendered judgment in favor of the plaintiffs, Butts & Co., against H. H. and Emma E. Anderson, the defendants, for the sum of \$762.67, with interest at 6 per cent from May 22, —, and decreed the foreclosure of the lien filed by plaintiffs. It appears that the clerk failed to record this judgment upon the journals of the court until the 13th day of March, 1905. On March 14, 1904, the defendants filed their motion for new trial, which was by the court overruled, and time given to make and serve case for an appeal. The record occupied this status until March 13, 1905, at which time the defendants filed a second motion for new trial, in which it was alleged as grounds therefor that, after the trial of the cause and before the defendants had

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been able to procure a transcript of the evidence submitted on the trial, the court stenographer died, and no one had been found who was able to read his notes, and that defendants were, for this reason, entitled to a new trial. This motion was presented to the court on March 14, 1905, and by the court sustained, for the reason, as set forth in the order and judgment of the court, "that the defendants were unable to get a transcript of the evidence of the trial held on March 11, 1904, by reason of the death of the court stenographer, Thomas F. Millikan." To this order granting a new trial the plaintiffs excepted, and bring the cause here on appeal from such order.

This court, in the case of *Weller v. Western State Bank*, 18 Okla. 478, 90 Pac. 877, stated the rule to be that orders of the trial court granting new trials should not be reversed unless it can be seen that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, without which error the ruling of the court granting the new trial would not have been made; yet, where the question presented was one purely of law, and the reviewing court is satisfied that an error of law was committed by the trial court, the order granting the new trial will be reversed and the judgment reinstated. Applying this rule to the case at bar, what is the result?

Our code of civil procedure controls in such matters. Section 295, civil code, (Wilson's Statutes 4493), provides: "A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. Second. Misconduct of the jury or prevailing party. Third. Accident or surprise which ordinary

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prudence could not have guarded against. Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice. Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. Sixth. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. Eighth. Error of law occurring at the trial, and excepted to by the party making the application." By the provisions of section 4497, the maximum time in which any proceedings may be commenced for the granting of a new trial is one year from the date final judgment was rendered. The cause for which the court granted a new trial does not even remotely come within any of the causes set forth in section 4493 for which the trial court may grant a new trial.

The next statutory provision in relation to new trials is section 4760, Wilson's Statutes, which is as follows: "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: First. By granting a new trial for the cause, within the time and in the manner prescribed in section two hundred and ninety-nine. Second. By a new trial granted in proceedings against defendants constructively summoned as provided in section seventy-eight. Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth. For fraud practiced by the successful party in obtaining the judgment or order. Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth. For the death of one of the parties before the judgment in the action. Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defend-

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ing. Eighth. For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and four. Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment." These several provisions embrace the causes for which the district court may set aside its judgments and grant new trials. The causes for which a court may grant new trials are for errors or omissions occurring prior to the rendition of judgment, except for newly discovered evidence after the trial, for which cause the judgment may be vacated and a new trial ordered.

In the case under consideration the cause was regularly tried, and judgment rendered. The motion for new trial was filed long after judgment, and was based upon statutory grounds, but no statutory grounds were found to exist. It is true the clerk had failed to record the judgment, but this did not go to the merits of the controversy or affect any substantial right of the defendants. The court had the power at any time to cause its clerk to make a record of the judgment it had rendered, and, if the court had rendered a judgment—and it is conceded by both parties that the judgment was regularly rendered on the 11th day of March, 1904—and the clerk failed to record such judgment, it was the duty of the court to direct the clerk to properly record its proceedings, and this could be, and was in fact, done *nunc pro tunc*. The cause upon and for which the court set aside its judgment was that, after the trial and after the judgment had been rendered, the court stenographer who took the shorthand notes of the trial had died, and the defendants, desiring to appeal the case, could find no one who could transcribe the shorthand notes of the deceased stenographer. We know of no law, nor have we been advised of any, which empowers the court to grant a new trial because of the inability of the judgment debtor to procure his record or prosecute his appeal. The law provides that the party desiring to take

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an appeal will prepare a case, setting out substantially so much of the record as will make apparent the errors relied upon, and the service of his prepared case upon the adverse party, who may, if not satisfied with its contents, propose such amendments as he may deem necessary, and, upon proper notice by either party, the court will settle the case. Upon such a case he may file his petition in error and have the judgment complained of reviewed by the appellate court. While the law contemplates that either party may have the stenographer to transcribe his shorthand notes, upon payment of the necessary fees therefor, it does not contemplate that such is the only method of preparing a record for a case-made.

Ever since courts of record have been established, and courts of appeals authorized to review the proceedings whereby judgments have been obtained, records have been prepared, the oral testimony of witnesses reproduced in writing, and the rulings of the court and exceptions thereto saved, and it is only within the past quarter of a century that shorthand reporters have been known to the courts. It is a manifest injustice to the plaintiff in this case to have his judgment vacated and a new trial ordered, not for any error in the proceedings or mistake of the parties, or court officers, but because long after the judgment was rendered a condition arose by which the dissatisfied party was unable to perfect an appeal from a judgment which this court must presume was right and just. The district court erred upon a pure and simple question of law, and granted a new trial without cause, when it was in duty bound to overrule the motion.

The ruling and order of the court sustaining the motion and granting a new trial is reversed, set aside, and vacated, and the said motion for new trial is overruled, at the costs of the defendants in error, and said judgment is reinstated in full force and effect as originally rendered and entered.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

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JAKE BARNES V. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 848.)

1. **CRIMINAL LAW—Verdict—Impeachment by Juror.** Upon the trial of a criminal cause, a juror who participates in the verdict will not be permitted to impeach his verdict by affidavit, deposition, or sworn statement. Public policy forbids that a juror should be heard to discredit his verdict.
2. **SAME—Remarks by Judge—Harmless Error.** An erroneous statement of the law, made by the trial judge in a colloquy with counsel during the argument to the jury, will not be sufficient grounds upon which to set aside the verdict, where it is obvious from the entire record that it could not have prejudicially influenced the verdict.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before B. F. Burwell, Trial Judge.

Affirmed.

Chambers & Taylor, for plaintiff in error.

W. O. Cromwell, Att'y Gen'l, Don C. Smith, Ass't, and J. H. Cline, Ass't, for defendant in error.

Opinion of the court by

BURFORD, C. J.: The plaintiff in error, Jake Barnes, was jointly charged by information with one D. C. Stout with the crime of carrying on certain gambling games. The case was tried to a jury, and Barnes was convicted and Stout acquitted. After judgment of conviction, Barnes filed his petition in error and case-made in this court.

There are but two alleged errors presented for our consideration. In support of his motion for new trial the defendant offered to prove by one of the jurors that after they had been considering the case a portion of two days and nights, and the jury had been balloting eleven for conviction and one for acquittal, it was agreed

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by the jurors that they would all vote for acquittal of Stout, and all for conviction of Barnes, and that pursuant to such agreement they arrived at the verdict which was returned. The court excluded the offered evidence, and it is contended that this is error. This court settled this question adversely to the contention of plaintiff in error in the case of *Colcord v. Conger*, 10 Okla. 458, 62 Pac. 276, and there is nothing in this case that calls for a modification of the rule there stated. It is there stated in the syllabus: "Upon grounds of public policy jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake or misunderstood the law or the result of their finding, or to show what items entered into the verdict, or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when the same is attempted to be impeached." At that time we stated that the only courts which had adopted a different rule were Kansas, Iowa, and Tennessee. To these should now be added Idaho. We are content with the rule as then stated, and adhere to it. There was no error in excluding the testimony of the jurors as to the manner in which they reached their verdict. The next contention of plaintiff in error is that the court, during the progress of the argument by counsel for the defendant, engaged in a friendly colloquy as to the law defining the crime for which the plaintiff in error was being tried, and in the course of such colloquy the trial judge made the statement in the presence of the jury "that it did not make any difference whether anything was played for or not, but under our statute faro, monte, poker, roulette and craps are absolutely prohibited, even though the games are played for fun." It may be conceded that this statement was equivalent to a declaration by the court of the law relating to the crime in question, and, while it was an erroneous statement of the law, the question as to whether it was reversible error depends upon whether or not in any state of the case it might have prejudiced the jury and influenced their

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verdict. The territory introduced a number of witnesses, all of whom testified that the room over the defendant's saloon, known as the "Southern Club" was a gambling room, and that on the day charged in the indictment and for a long time previous thereto the game of crap, faro, roulette, and klondyke were played there for money, and that the defendant usually received the money from the tables or games. Every witness testified that the games were dealt or played for money, and there was not a particle of evidence to the effect that any games were played or conducted in said gambling house for fun or amusement. The only controverted or uncertain question in the proof was as to who were the owners or managers of the place. The defense introduced no testimony. Upon this state of facts the statement of the court could not have in any manner prejudiced the defendant's case before the jury, and hence was not such error as will warrant a reversal of the judgment.

The judgment of the district court of Oklahoma county is affirmed, at the costs of the plaintiff in error.

Burwell, J., who presided in the court below, not sitting; all the other Justices concurring.

BOARD OF COUNTY COMMISSIONERS OF DAY COUNTY V. STATE OF KANSAS.

(Filed September 5, 1907.)

(91 Pac. 699.)

- 1 **EVIDENCE—Judicial Notice—County Seats De Facto—Validity of Court Proceedings.** Courts of record in any county will take judicial notice of the county seat of such county, and, if the seat of public business in any county is the county seat *de facto*, such courts will take notice thereof, and the validity of the proceedings of such courts transacted at the county seat *de facto* cannot thereafter be questioned in a collateral proceeding.
- 2 **COURTS—Corrections of Record—Nunc Pro Tunc Order.** A person interested in the proceedings of a court of record may appear before the court at any time and ask to have the journal of the

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court made correct and complete as of the date such record should have been made, and the court should entertain and hear such motion upon notice given to those adversely interested. Where the default was that of the court or its officers, it is the duty of the court to make its record complete at any subsequent date when the default is called to its attention without the formality of a motion.

3. **JUDGMENT—Res Adjudicata—Validity of Bond Issue.** Where a court of competent jurisdiction has determined the validity of the bonds involved in a proceeding provided by the statute, and has decreed that the bonds were valid obligations and issued in strict conformity with the laws of the territory, and no objection or exception was taken therefrom, the decree and judgment of the court is final and conclusive upon all matters put directly in issue, tried and determined in that proceeding. (Following *Territory v. Jones*, 9 Ok. 133, 59 Pac. 976.)

(Syllabus by the Court.)

Error from the District Court of Day County; before J. L. Hancock, Trial Judge.

Affirmed.

E. S. Sharp, Co. Att'y, and Cowgill & Dunn, for plaintiff in error.

C. C. Coleman, Att'y Gen'l, and John S. Dawson, Ass't, for defendant in error.

STATEMENT OF FACTS.

This action was originally commenced in the district court of Day county, Oklahoma, by the defendant in error filing therein its petition, which, with exhibits attached and referred to in the petition, is as follows:

"The state of Kansas, the plaintiff herein, complains of the board of county commissioners of Day county, the defendant herein, and for its causes of action against said defendant says:

"That the state of Kansas is one of the states of the United States of America, and was admitted into the Union on January 29, 1861.

"That the defendant, the board of county commissioners of Day county, is the lawful executive and administrative body of Day county, Oklahoma, and that said Day county was organized

Statement of the Facts.

on or about ——— 1902, and is now, and at all times hereinafter mentioned was, one of the duly organized counties of the territory of Oklahoma.

“That by various acts of congress, the state of Kansas, plaintiff herein, was granted large tracts of land out of the public domain for the purpose of creating a fund, to be known as the agricultural college endowment fund of the state of Kansas, and providing that the said fund realized from the sale of said lands should never be diminished, but should be perpetual, and the principal sum of the said fund should be invested, and the interest money derived from such investments should be for the support of the Kansas State Agricultural College. That, in pursuance of said acts of congress, the state of Kansas has accumulated a large fund, to wit, five hundred thousand dollars, which is invested from time to time in municipal bonds, and interest thereon is devoted to the support of said college.

“That the defendant, the board of county commissioners of Day county, on July 10, 1900, in open court in the district court of said Day county, Oklahoma, at the lawful sitting of said court, ordered by the supreme court of the territory of Oklahoma to be held at Grand, Day county, Oklahoma, for the issue of county bonds, July 10, 1900, before the judge of said court, executed certain judgment funding bonds of said county, as more fully hereinafter appears, and the said bonds were then and there signed by the duly qualified and acting chairman of the board of county commissioners of said county, and the said bonds were then and there attested and signed by the duly qualified and acting county clerk of said court, and the said bonds were then and there signed by the duly qualified and acting judge of the district court of said county, and were then and there duly attested and signed by the duly qualified and acting deputy clerk of the district court of said county.

“Thereafter the bonds so executed as aforesaid were duly registered by the auditor of the territory of Oklahoma, and said auditor certified on the back of each bond aforesaid, under the seal of his office, that the said bonds were legal and regularly issued according to law. True copies of the said auditor's certificate of registration and of the legality and regularity of the issue of the bonds aforesaid are hereinafter set out in Exhibits B and C, attached hereto and made a part hereof.

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"That the defendant issued the said judgment funding bonds as aforesaid and said bonds were made payable to bearer, and thereafter divers and certain of said bonds of said judgment issued of July 10, 1900, aforesaid, more fully hereinafter set forth, were bought in good faith in the open market by the loan commissioner of the State Agricultural College of the state of Kansas as an investment for the endowment fund of said college, for a valuable consideration; and out of an abundance of prudence and caution on the part of the said loan commissioner, before purchasing said bonds, the said loan commissioner required to be furnished to him a certified copy of all the papers on file in the office of the auditor of the territory of Oklahoma containing the history of the issue of said judgment funding bonds, and particularly showing the journal entry of the judgment upon which this issue of bonds were based, and particularly showing the amount of said issue, and particularly showing the total outstanding indebtedness of said Day county, and particularly showing the assessed valuation of said Day county, which copy of all the papers on file as aforesaid, in the office of the auditor aforesaid, was duly certified by the auditor of Oklahoma under the seal of his office, a true copy of which is hereto attached, marked Exhibit A, and made a part of this petition.

"That the bonds of this judgment funding issue so purchased as aforesaid by the loan commissioner as aforesaid are bonds numbered 11, 12, 13, 14, 15, and 16, for \$1,000.00 each, and bond numbered 18 for \$100.00, and all of said bonds so purchased as aforesaid are issued as of the date of July 10, 1900, and due July 10, 1910. A true copy of bond number 11 is attached hereto, marked 'Exhibit B', except as to numbering. A true copy of bond number 18 is attached hereto, marked 'Exhibit C', and made a part of this petition.

"That the bonds so purchased as aforesaid are the property of this plaintiff and the plaintiff is entitled to the interest thereon. The said bonds were issued with interest coupons attached, payable semi-annually, bearing six per cent. interest, and the defendant has paid with reasonable promptness to this plaintiff all interest coupons on the aforesaid bonds so purchased for its agricultural college endowment fund up to and including the interest coupons pertaining to the aforesaid bonds 11, 12, 13, 14, 15, 16, and 18 which matured on July 10, 1902; and the defendant has

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made default in payment of all the interest coupons of said bonds numbered 11, 12, 13, 14, 15, 16, and 18 aforesaid which have matured since July 10, 1902, and the defendant has refused and still refuses to pay the same.

"FIRST CAUSE OF ACTION.

"Plaintiff refers to the allegations of this petition herein above set forth, and makes them all a part of this its first cause of action, and says:

"That on January 10, 1903, the interest coupon, number 5. of the aforesaid bond number 11, the same being the property of the plaintiff, became due and defendant made default; and demand was duly made for its payment, and defendant refused and still refuses to pay the said coupon. A true copy of said coupon is in words and figures as follows:

THIRTY DOLLARS

\$30.00.

Day County, Oklahoma Territory.

Day County, Oklahoma Territory, will pay to bearer the sum of thirty (\$30) Dollars, on the 10th of January, 1903, at the Fiscal Agency of the territory of Oklahoma, in the city and state of New York. In the event of the discontinuance of said place, then at the Chemical National Bank in said city and state, for semi-annual interest, due on that date, on its judgment funding bond. Dated July 10, 1900.

No. 5.

EDSON L. MEAD,
County Clerk.

COSMO FALCONER,
Ch'm B'd Co. Com.

"Wherefore, there is due this plaintiff from the defendant, on this cause of action, the sum of thirty dollars on said coupon, and interest thereon at seven per cent. per annum since the maturity of said coupon set out in this cause of action."

Here follow causes of action numbered from second to forty-second, inclusive, of the same general character as the first cause of action, and the petition continues thus:

"That the aggregate sum of all the interest coupons due and unpaid as aforesaid in plaintiff's several causes of action above set forth against this defendant is \$1,098.00.

"Wherefore, plaintiff prays judgment against said defendant in the sum of one thousand ninety-eight dollars, with interest on \$183.00 thereof at the rate of 7 per cent. per annum from January 10, 1903; with interest on \$183.00 thereof at the rate of 7 per cent. per annum from July 10, 1903; with interest on \$183.00 thereof at the rate of 7 per cent per annum from January 10, 1904;

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with interest on \$183.00 thereof at the rate of 7 per cent. per annum from July 10, 1904; with interest on \$183.00 thereof at the rate 7 per cent. per annum from January 10, 1905; with interest on \$183.00 thereof at the rate of 7 per cent. per annum from July 10, 1905, and for costs of this suit.

"C. C. COLEMAN, Attorney-general of Kansas, and JOHN S. DAWSON,

" Attorneys for Plaintiff."

"Exhibit A.

"In the District Court, Fifth Judicial District, and for Day County, Oklahoma Territory. In the Matter of the Funding of the Judgment Indebtedness of the County of Day and Territory of Oklahoma.

"Journal Entry.

"Now, on this 10th day of July, A. D., 1900, this matter came on to be heard, by the court upon application of the board of county commissioners of said county to make a showing and have the court determine the amount of the judgment indebtedness of said county and sign the judgment funding bonds to be issued for paying same, and the board of county commissioners of said county, and the county clerk thereof and by the county attorney of said county, and by counsel and the following judgment creditors by counsel, to wit: Charles S. Hinchman, F. M. Hubbell, George Theis, Jr., and A. Ferguson.

"And the clerk of the district court, and the sheriff of Day county, being present, and the publication notice, required by statute being here made and approved.

"And the evidence having been heard by the court, the court finds the amount of judgment indebtedness of said Day county to be the sum of \$16,738.23, which is wholly unpaid and owing to the several judgment creditors as follows, to wit:

Charles S. Hinchman, ...	\$10,170.37,
F. M. Hubbell, ...	5,845.60,
George Theis, Jr., ...	618.40,
A. Ferguson, ...	103.86.

"And the court further finds that said judgment creditors, and each of them and said board of county commissioners of said Day county have agreed that bonds should be issued by said board of county commissioners of said Day county and accepted by the creditors in satisfaction of said judgment, dollar for dollar, and that publication of notice required by statute prior to the applica-

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tion to issue said bonds has been duly made, and that one-third of the judgment indebtedness of said county cannot be paid from the sinking fund in any one year by a levy of 5 mills on the dollar, as shown by the last preceding assessment of said county; and the court further finds that all things precedent to the issuance of said bonds have been duly done and performed, and the court further finds that the amount of outstanding bonded indebtedness to be the sum of \$3,000.00, and the amount of outstanding legal judgment indebtedness to be the sum of \$16,738.23. The court further finds that the aforesaid bonded indebtedness and the above valid judgment indebtedness does not exceed four per cent. of the assessed valuation of the taxable property of said Day county according to the last assessment valuation of the assessors for said county, and the bonds being presented, form and amount duly signed by the chairman of the board of county commissioners of Day county and by the county clerk of said county, the court is satisfied that they are of the class and character authorized by statute, and said bonds are approved in form, classes and amounts, and therefore said bonds are signed by the judge of said court to the amount as evidenced by the face thereof, \$16,738.23, sixteen thousand seven hundred thirty-eight and twenty-three one-hundredths dollars, and said bonds being signed are delivered to the county treasurer of said county in open court, and the same are receipted for to the judge of said court.

“JOHN L. MCATEE, Judge.

“Attest: J. P. RENSHAW, Clerk District Court.

“By O. H. RICHARDS, Deputy.”

“Territory of Oklahoma, Day County. ss.:

“I, J. P. Renshaw, clerk district court of the fifth judicial district of the territory of Oklahoma, do hereby certify that the within and foregoing to be a full, true and complete copy of the original journal entry in the matter of issuing bonds in said county on the 10th day of July, 1900, as the same now appears on file and record in my office, in the town of Grand, county of Day, and territory of Oklahoma.

“Witness my hand and official seal, at my office at Grand, in the county of Day and territory of Oklahoma.

“J. P. RENSHAW, Clerk District Court.

“[SEAL]

O. H. RICHARDS, Deputy.

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"Office of Edson L. Mead, County Clerk, Day County.

"Territory of Oklahoma, Day County. ss.:

"I, Edson L. Mead, county clerk in and for Day county, Oklahoma, do hereby certify, that the assessed valuation of the taxable property in and for said county as shown by the last assessment of said county amounts to the sum of \$501,156.00, five hundred and one thousand one hundred and fifty-six dollars; and that the total amount of outstanding indebtedness of said county of Day, from all sources, amounts to (\$19,800.00) nineteen thousand eight hundred dollars.

"Given under my hand, whereunto I have affixed the seal of my office, this 10th day of July, A. D., 1900.

"EDSON L. MEAD,

"[SEAL]

County Clerk of Day County.

"Territory of Oklahoma, County of Logan. ss.

"I, S. M. Hopkins, auditor in and for the territory of Oklahoma, do hereby certify that the hereto attached and foregoing papers are a true and correct copy of all the papers on file in my office in the matter of the issuance of judgment funding bonds in the amount of \$16,738.23, by Day county, Oklahoma, and further, that the sworn statement, as made by the county clerk to this office, shows the total outstanding indebtedness of said county amounts to \$19,800 and the assessed valuation to \$501,156.

"I further certify, that the omission of the judge's signature to the copy of the findings hereto attached was a mistake.

"In testimony whereof, I have this day set my hand and affixed the official seal of my office, at Guthrie, Okla., this 31st day of July 1900.

"S. M. HOPKINS, Auditor.

"[SEAL]

By E. P. McCABE, Deputy Auditor."

Exhibit B.

"United States of America.

"Territory of Oklahoma.

"No. 11.

1000 Dollars.

"Day County Judgment Funding Bond.

"Know all men by these presents:

"That the county of Day, in the territory of Oklahoma, acknowledges itself to be indebted, and for value received hereby promises to pay to the bearer the sum of one thousand dollars (\$1,000).

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lawful money of the United States of America, on the tenth day of July, A. D., 1910. However, this bond is subject to call and payment at any time at the option of said county, together with interest on said sum from date hereof, until paid at the rate of six per centum per annum, payable semi-annually on the tenth days of January and July respectively, in each year, upon presentation and surrender of the interest coupons hereto attached, as they severally become due, both principal and interest payable at the Western National Bank, in the city of New York and state of New York and for the prompt payment of this bond, with interest as aforesaid, at maturity, the full faith and credit of said county of Day, in the territory of Oklahoma, is hereby irrevocably pledged.

“This bond is issued by the said county of Day, aforesaid, for the purpose of funding and paying valid and existing outstanding judgments recovered against said county, in the courts of competent jurisdiction within the said territory of Oklahoma, and having jurisdiction both of the person of said county and of the subject-matter of the actions prosecuted against said county, resulting in the rendition of said judgments, and is issued by virtue of the authority conferred by article 11, chapter 5, of the Session Laws of the territory of Oklahoma, for the year 1897, being an act of the territorial assembly of said territory, entitled ‘An Act Providing for the Issuance of Bonds in Payment of Judgments against Counties and other Municipal Corporations.’ Approved on the 12th day of March, 1897, and subject to its provisions.

“And it is hereby recited, certified and warranted, that all acts, conditions and things required to be done precedent to and in the issuing of this bond have been properly done and performed in regular and due form required by law; and that said county has duly proved to the satisfaction of the district court of the county of Day and territory of Oklahoma, the existence, validity, force and legality of said judgment indebtedness, and that the said judgment indebtedness remains unpaid at the date of the issuance of this bond, and that an agreement has been made for the settlement of such judgment by the issuance of this bond, and that all other requirements of the said act aforesaid, together with all other requirements of law in the premises, have been duly complied with in the issuance of this bond and that no congress-

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sional or statutory limitation of the amount of the indebtedness of said municipality is exceeded by this issue.

"In witness Whereof, the said county of Day and territory of Oklahoma has caused this bond to be signed by the chairman of its board of county commissioners and its county clerk, under the seal of said county, this tenth day of July, A. D., 1900, and the Honorable John L. McAtee, the judge of the district court of said county in open court, as the act of said court, has also signed these presents on the said day and date.

"COSMO FALCONER,

"Chairman of the Board of County Commissioners.

"EDSON L. MEAD, County Clerk.

"Attest:

"[SEAL]

"Signed in open court by the district court of the county of Day, Oklahoma Territory, this tenth day of July, A. D., 1900.

"JNO. L. McATEE,

"Judge of the District Court of Day County.

"Attest:

"J. P. RENSHAW,

"Clerk of the District Court of Day County.

"[SEAL] By O. H. RICHARDS, Deputy."

Indorsed on the back thus:

"Territory of Oklahoma.

"Office of the Territorial Auditor.

"I, S. N. Hopkins, auditor of the territory of Oklahoma, do hereby certify the within bond to be legally and regularly issued, and has been registered in my office this day, pursuant to an act of the legislative assembly of the territory of Oklahoma, entitled 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved March 12, 1897.

"Witness my hand and official seal, done at my office in the city of Guthrie, Oklahoma Territory, this 12th day of July.

"S. N. HOPKINS, Territorial Auditor.

"[SEAL]

"By E. P. McCABE, Deputy."

Also indorsed on the back thus:

"No. 11, Day county, Oklahoma Territory, judgment funding bond. 1000 dollars. Dated July 10, 1900, due July 10, 1910.

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Interest 6 per cent. per annum, payable semi-annually on the tenth days of January and July of each year, at the Western National Bank, in the city of New York and state of New York."

Exhibit C.

"United States of America.

"Territory of Oklahoma.

"No. 13.

100 Dollars.

"Day County Judgment Funding Bond.

"Know all men by these presents:

"That the county of Day, in the territory of Oklahoma, acknowledges itself to be indebted, and for value received promises to pay to the bearer, the sum of one hundred dollars (\$100), lawful money of the United States of America, on the tenth day of July, A. D., 1910. However, this bond is subject to call and payment at any time at the option of said county, together with interest on said sum from the date thereof, until paid, at the rate of six per centum per annum, payable semi-annually on the tenth days of January and July, respectively, in each year, upon presentation and surrender of the interest coupons hereto attached. as they severally become due, both principal and interest payable at the Western National Bank in the city of New York and state of New York, and for the prompt payment of this bond, with interest as aforesaid, at maturity, the full faith and credit of said county of Day, of the territory of Oklahoma, is hereby irrevocably pledged.

"This bond is issued by the said county of Day, aforesaid, for the purpose of funding and paying valid and existing outstanding judgments recovered against said county, in the courts of competent jurisdiction within the said territory of Oklahoma, and having jurisdiction both of the person of the said county and of the subject-matter of the action prosecuted against said county, resulting in the rendition of said judgment, and is issued by virtue of the authority conferred by article 11, chapter 5, of the Session Laws of the territory of Oklahoma, for the year 1897, being an act of the territorial assembly of said territory, entitled 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations.' Approved on the 12th day of March, 1897, and subject to its provisions.

"And it is hereby recited, certified and warranted, that all

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acts, conditions and things required to be done precedent to and in the issuing of this bond have been properly done and performed in regular and due form required by law; and that the said county has duly proved to the satisfaction of the district court of the county of Day and territory of Oklahoma, the existence, validity, force and legality of said judgment indebtedness, and that the said judgment indebtedness remains unpaid at the date of the issuance of this bond, and that an agreement has been made for the settlement of such judgments by the issuance of this bond, and that all other requirements of the said act aforesaid, together with all other requirements of law in the premises, have been fully complied with in the issuance of this bond, and that no congressional or statutory limitation of the amount of the indebtedness of said municipality is exceeded by this issue.

"In witness whereof, the said county of Day and territory of Oklahoma has caused this bond to be signed by the chairman of its board of county commissioners and its county clerk, under the seal of said county, this tenth day of July, A. D., 1900, and the Honorable John L. McAtee, the judge of the district court of said county, in open court, as the act of said court, has also signed these presents on the said day and date.

"COSMO FALCONER,

"Chairman of the Board of County Commissioners.

"Attest:

"EDSON L. MEAD, County Clerk.

"[SEAL]

"Signed in open court by the district court of the county of Day, Oklahoma Territory, this tenth day of July, A. D., 1900.

"JNO. L. MCATEE,

"Judge of the District Court of Day County.

"Attest: J. P. RENSHAW,

"Clerk of the District Court of Day County.

"[SEAL] By O. H. RICHARDS, Deputy."

Indorsed on back thus:

"Territory of Oklahoma.

"Office of the Territorial Auditor.

"I, S. N. Hopkins, auditor of the territory of Oklahoma, do hereby certify the within bond to be legal and regularly issued, and has been registered in my office this day, pursuant to an act of the legislative assembly of the territory of Oklahoma, entitled

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'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved March 12, 1897.

"Witness my hand and official seal, done at my office in the city of Guthrie, Oklahoma Territory, this 12th day of July.

"S. N. HOPKINS, Territorial Auditor.

"[SEAL]

By E. P. McCABE, Deputy."

Also indorsed on the back thus:

"No. 18. Day county, Oklahoma Territory, judgment funding bond. One hundred dollars. Dated July 10, 1900, due July 10, 1910. Interest 6 per cent. per annum, payable semi-annually on the tenth days of January and July of each year, at the Western National Bank, in the city of New York, and state of New York."

To which petition the defendant answered as follows:

"The defendant comes and for his answer to the plaintiff's petition filed herein denies each and every allegation therein contained, and not hereinafter admitted.

"For a second and further defense to plaintiff's petition the defendant alleges that the bonds numbered 11, 12, 13, 14, 15, and 16 and 18, and the interest coupons thereto, at the time attached, and of which the plaintiff at the time of bringing of this action claimed to be the owner, were not issued pursuant to any law or authority of the territory of Oklahoma, and were at all times and now are illegal and void and are not a binding obligation against this defendant. The defendant alleges that on the 10th day of July, 1900, the district court of the territory of Oklahoma was not in session, open or otherwise, and there was no sitting of the said court in said county in the month of July, 1900, and that no judgment indebtedness of said Day county, and particularly the indebtedness mentioned in Exhibit A to plaintiff's petition were proved by the defendant before the district court of said Day county, nor did the judge of said court thereof, in open session or otherwise, on the 10th day of July, 1900, or at any other time, find any amount of judgment indebtedness of said county to exist, and have effect and be in force against the said county; and that said district court, nor the judge thereof did not, on the said day, to wit, July 10, 1900, nor at any other time, in open session of said court, nor at all cause to be made on the record of said court, a statement and findings of the

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evidence of any judgment or judgments and the said county, by and through its board of county commissioners in which the holders of said judgments agreed to accept, and the said county agreed to have issued the bonds in question in payment of said judgments or any of them in settlement of said judgments or any of them before the signing of said bonds by the judge of the said district court, nor at any other time, and that the said judge of the district court of said county was at the time of the signing of said bonds and at all times prior and subsequent thereto, without authority or jurisdiction to sign the same.

"For a third and further defense, defendant says that at all times mentioned in plaintiff's petition the county seat of Day county, Oklahoma Territory, was legally at Ioland, where the same had been established by the congress and the secretary of the interior of the United States, and that the district court of said county could only be legally held at said county seat, and that all notices and proceedings had about the issue of the bonds in question or other bonds should have been given from and referred to the said Ioland, the county seat of said county. That there was no term of the district court in the year 1900 held at said Ioland, the county seat of said county, nor was any notice given of any bonding proceedings nor the funding of any judgment indebtedness of said county into bonds to be had at said county seat. That no proof was made before the judge of the district court, in open court or otherwise, in said Ioland, the county seat of the said Day county, of any judgment indebtedness against said county, nor was any bonds issued or signed by the chairman of the board of county commissioners of said county at Ioland, in the county of Day, on the 10th day of July, 1900, or at any other time. That no finding was made by the district court of said county nor the judge thereof, in open session or otherwise, of any judgment indebtedness against said county of Day, and which he caused to be entered upon the record of said court at Ioland, the county seat of said county, or other place therein, and that all said bonds are void, and were at all times since their pretended issue; that the coupons sued upon herein are for interest accrued upon the principal bonds claimed to be held and owing by the plaintiff; that they derived their validity, if any, from the validity of the parent bond from which they were clipped.

"For a fourth and further defense, the defendant says that in

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the month of July, 1900, the last assessed valuation of the property of said county for taxes was \$469,289.77; that four per cent. of said amount is \$18,771.54; and that said last named sum was the limit for which said county could become indebted in said year; that at the time of the pretended issue of said bonds in question, there were outstanding bonds of said county in the sum of \$7,500.00, exclusive of interest, and warrant indebtedness in the sum of \$5,700.00; and that said bonds and warrants were legal and valid issue of said county and part of its indebtedness; that at the time of the issue of the bonds in question, \$16,800.00 were issued legally or illegally, and upon the coupons for interest of six of said bonds plaintiff seeks to recover in this action; that of moneys in the treasury of said county and belonging thereto, taxes levied and uncollected and all other property, money and resources belonging to said county at the time of the issuance of said bonds on July 10, 1900, was the sum of \$5,700.00 and deducting said amount from the bond and warrant indebtedness of said county as aforesaid, the said county could only have issued on said date, to-wit, July 10, 1900, bonds to the amount of \$11,200.00, whereas the said county issued \$16,800.00 in bonds which amount exceeded the amount the county might have issued \$5,600.00, and that \$5,600.00 of said bonds are illegal and void.

“Defendant further says that because of the facts aforesaid the said county could not, at the time of the issue of the bonds in question, legally issue to exceed \$11,200.00 of the bonds of said county and that the excess of said amount, to-wit, \$5,600.00 was and is illegal and void for being in excess of four per centum. of the last assessed valuation of the property of said county for taxation preceding the issue of said bonds, and that said amount of illegal issue effects and enters into each of the bonds of said issue, and should be apportioned to and among each and all said bonds. That defendant makes the second count of this answer a part of this count.

“For a fifth and further defense and by way of cross-petition against the plaintiff, the defendant says that it has paid and the plaintiff has received interest paid on the seven bonds it holds and which are described in its petition, the sum of \$122.00; that said interest payments were made under the mistaken belief of the defendant that the bonds on which it was paid were legal and binding obligations of the said county of Day for their face value,

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and that since the discovery by the defendant that said bonds were illegal in whole or in part, the defendant has not paid any interest upon the same. The defendant says that it makes the second and fourth counts of this answer a part of this count.

"Wherefore, the defendant prays judgment against the plaintiff that the interest coupons sued on be decreed and adjudged illegal and void, and the petition of plaintiff be dismissed, and that the defendant recover the interest heretofore paid on said bonds in amount \$122.00, and that if said bonds be found in part legal and part illegal, that the defendant have judgment that the interest paid on the amount of said bonds found to be illegal be credited on the interest due and owing thereon, for costs, and all other proper relief.

"E. S. SHARP, County Attorney, and COWGILL & DUNN,
"Attorneys for Defendant."

To which answer plaintiff replied as follows:

"Comes now the plaintiff and after leave of court first had and obtained, filed its amended reply to the defendant's answer in this cause. First, plaintiff denies each and every allegation in defendant's answer so far as the same are inconsistent with the allegations of plaintiff's petition. Second, replying further to defendant's answer plaintiff says that it relied implicitly and absolutely upon the recitals in the bond to which the coupons in controversy pertain, and relied implicitly and absolutely on the recitals on the back of the bond as certified by the auditor of Oklahoma Territory."

After the issues in the cause were joined as heretofore shown, the cause coming on to be heard, the plaintiff filed the following motion for judgment upon the pleadings:

"Comes now the said plaintiff, the state of Kansas, and exhibits to the court the petition of the said plaintiff, the answer of the said defendant, and the reply of the plaintiff thereto, and shows to the court that the said petition of the plaintiff alleges and sets forth a good and valid cause of action against said defendants; and that all the allegations, averments and statements of the said answer are not sufficient to constitute any defense against the said cause of action of the plaintiff; and that it appears from the said petition and answer that the said defendant has no good, valid and sufficient defense to the said cause of action alleged in plaintiff's petition;

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and that it appears from all the pleadings in said cause that the said plaintiff is entitled to judgment as prayed for in its petition. Now, therefore, said plaintiff moves the court for judgment in this cause upon the pleadings as prayed for in plaintiff's petition."

The cause came on to be heard before the court upon said motion for judgment upon the pleadings, and the court overruled the motion for reasons expressed in the argument, which as stated by the court was the fact "that the journal entry and the matter of funding the judgment indebtedness of the county is not on file, never has been filed, there is no filing marks, and has never been recorded, and the entire absence of any record as to a term of court at that time or any entry concerning the entry of judgment in that case."

While said cause was still pending and not finally disposed of, the court adjourned to the next day, and upon the reconvening of the court Mr. Darrow, attorney for defendant in error, read and presented to the court a motion asking that the journal entry in the matter of funding the judgment indebtedness of the county be entered upon the journal of the court *nunc pro tunc*; which motion was as follows:

"In the District Court of Day County, Oklahoma.

"In the Matter of the Funding of the Judgment Indebtedness of the County of Day and Territory of Oklahoma.

"Motion to Enter of Record the Journal Entry of Judgment Relating to the Issue of Day County Funding Bonds of July 10 1900.

"Comes now the state of Kansas, by C. C. Coleman, its duly qualified and acting attorney general, and John S. Dawson, its duly qualified and acting assistant attorney general, and shows to the court that the state of Kansas is the owner of certain judgment funding bonds of Day county, Oklahoma, issued July 10, 1900, in the district court of Day county, Oklahoma, under and by virtue of a judgment pronounced by said court on said date, in pursuance to a proceeding in said court invoked by the board of county commissioners in accordance with the laws of Oklahoma Territory, at a special sitting of said court at Grand, Day county, Oklahoma, designated and ordered by the supreme court of Oklahoma Ter-

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ritory and by the honorable chief justice of said supreme court, and held in accordance therewith.

"And the state of Kansas is the *bona fide* holder in good faith of bonds 11, 12, 13, 14, 15, 16 and 18 of said issue, and is vitally and materially interested, both in law and in equity, in the matters involved in the proceeding whereby the judgment and other indebtedness of Day county was determined on said July 10, 1900, as aforesaid, and where the assessed valuation of the taxable property of said Day county, and the statutory limit of indebtedness which might be and was funded into judgment-funding bonds of said county were determined and adjudicated.

"And the state of Kansas further shows the court that the journal entry of judgment and findings of the district court of Day county, Oklahoma, is in the custody of the clerk of said district court of Day county, but for some reason unknown the said journal entry does not appear of record.

"Wherefore, the state of Kansas prays the court that the court now order the journal entry aforesaid to be entered of record in the records of the district court of Day county, and for such other precautions as may be necessary to preserve intact the proceedings of said court in the matter of the funding of the judgment indebtedness of Day county, Oklahoma, had and done at the sitting of said court at Grand, Day county, Oklahoma, on July 10, 1900, as aforesaid.

"And the state of Kansas, your orator herein, as in duty bound, will ever pray, etc.

"THE STATE OF KANSAS.

"By C. C. COLEMAN, Attorney General of Kansas, and

"JOHN S. DAWSON, Assistant Attorney General of Kansas,

"Attorneys and Solicitors for the State of Kansas.

"Territory of Oklahoma, Day County, as:

"John S. Dawson, being duly sworn, on his oath says, that he is assistant attorney general of the state of Kansas; that he is familiar with the matters set forth in the above motion; that all of the allegations and statements therein are true, so far as he knows positively, and as to all other matters therein set forth, he believes them to be true, and that your orator, the state of Kansas, is well entitled at law and in equity to the relief prayed for therein

"JOHN S. DAWSON.

Statement of the Facts.

"Subscribed and sworn to before me, a notary public of Day county, Oklahoma, this 27th day of March.

"C. B. LEEDY, Notary Public.

"[SEAL.]

"My Commission Expires August 15, 1906."

Notice of a purpose to file such motion was on the day before the filing of the same served upon E. S. Sharp, county attorney, and W. H. Monser, county clerk of Day county. Upon the filing of such motion counsel for the plaintiff in error objected to the consideration of it for the reason that sufficient facts were not shown to justify the relief asked for. The court thereupon announced that he would hear the evidence, which offer was objected to by counsel for plaintiff in error, and the objection overruled. The court thereupon entered its judgment directing the recording of the journal entry of judgment of July 10, 1900, authorizing the issuance of funding bonds, the coupons of which bonds issued pursuant to and in compliance with the judgment of the court of July 10, 1900, are in issue in this case, which judgment of the court so entered was in words and figures as follows:

"And now, to-wit, on March 28, 1906, at a regular sitting of the above named court, the state of Kansas appeared by John S. Dawson, its attorney, and moved the court to enter of record the journal entry of judgment relating to the issue of Day county funding bonds of July 10, 1900, and the bond notice and publisher's affidavit thereto appertaining; and the said state of Kansas showed the court that the state aforesaid was the owner of certain of the bonds of Day county of the judgment funding issue of July 10, 1900, issued by the board of county commissioners of Day county, Oklahoma Territory, under and by virtue of a proceeding had before the above named court at the sitting of said Day county district court on said July 10, 1900, and that the said state of Kansas is vitally and materially interested and affected thereby.

"And it appearing that the said journal entry of the findings and proceedings had in said court on July 10, 1900, pertaining to the issue of Day county judgment funding bonds of said July 10, 1900, has been reduced to writing and is in the custody of the clerk of the district court of Day county, but the said journal entry has not been entered of record.

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"And the court having been fully advised and informed in the premises and of all matters material and pertaining thereto it is therefore decreed, adjudged and ordered that the clerk of the district court do now and here record the said journal entry and bond notice aforesaid, pertaining to the issue of the Day county judgment funding bonds of July 10, 1900, in the matter as entitled above.

"J. L. PANCOAST, Judge Day County District Court."

This journal entry of the judgment of July 10, 1900, entered of record, is set out as Exhibit A of the plaintiff's petition. After hearing the motion to make the journal entry of July 10, 1900, this cause was further called for hearing upon the motion for judgment on the pleadings, and the court thereupon set aside its former order overruling the motion for judgment on the pleadings, and, upon reconsideration of the same, sustained said motion, and rendered judgment in favor of the plaintiff in the sum prayed for in the petition herein. Motion for new trial having been made and overruled, which prayed for a new trial upon the ground that the judgment was not sustained by sufficient evidence and for error of law occurring at the trial and excepted to at the time, the plaintiff in error, defendant below, brings the cause to this court praying a reversal for the errors complained of.

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GILLETTE, J.: This action having been determined in the court below upon a motion for judgment on the pleadings, and owing to the importance of the subject-matter, we have set out at length, in the statement of facts, the pleadings and proceedings had and considered upon the trial of the cause. It will be observed that, while the action is founded upon written instruments, the answer setting up such defense as the county of Day, plaintiff in error, had to the allegations of plaintiff's petition was not verified, by reason whereof the allegations of the petition, touching the execution of the instrument sued on, under the provisions of section 4312, Wilson's Ann. Stat., are taken as true. Such statute provides:

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"In all actions, allegations of the execution of written instruments and endorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." By the pleadings in the case therefore, when the same was submitted to the trial court for consideration upon the motion for judgment on the pleadings, it was admitted: First, that Day county was a duly organized and existing municipal corporation of the territory of Oklaloma, as in the petition alleged; second, that on July 10, 1900, at a lawful sitting of said court the board of county commissioners, by authority of the court, executed the bonds, the coupons of which are herein sued on, and said bonds were signed by the chairman of the board of county commissioners of said county and attested and signed by the duly qualified and acting county clerk, and were thereafter signed by the duly qualified and acting judge of the district court of said county, whose acts were duly attested by the duly qualified and acting deputy clerk of said district court; third, that the coupons sued on herein were and are the coupons of the bonds so as aforesaid executed, and were signed by the chairman of the board of county commissioners of said county and attested by the county clerk. There was, therefore, such admission in the pleadings as to support a judgment based thereon, and the same must stand, unless the allegations of the answer present some fact touching the validity of the bonds and coupons presented by the petition which entitled the defendant to a hearing thereon. We will, therefore, notice and consider the allegations of the answer in connection with the admitted facts in the case.

The first allegation, that the bonds Nos. 11 to 18, inclusive, and interest coupons thereto attached, a portion of which coupons were not issued pursuant to any law or authority, and are therefore not a binding obligation, is not discussed in the brief of plaintiff in

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error or insisted upon as a material ground of defense, nor can we see how such a defense can be made. The bonds recite that they are issued pursuant to the authority conferred by article 2, chap. 5, of the Session Laws of Oklahoma for 1897, and the trial court, at the time of the rendition of its judgment in this case, took judicial notice of the provisions of such statute, which authorizes the issuance of municipal bonds of the character of the bonds and coupons in question.

The next material allegation of the answer was that no court was held in Day county, on July 10, 1900, the day on which the instruments sued on were by the district court authorized to be issued, and a judgment indebtedness found to exist which, under the authority of the statute, was authorized by the court to be funded into judgment funding bonds. By this plea, we take it that it was intended by the plaintiff in error to plead what is commonly termed *nul tiel record*, which is ordinarily proved by inspection of the record. The bonds, from which the coupons sued on were taken, as shown by the petition, recited the holding of the court July 10, 1900, and the authority of the court of that date to execute the same; and Exhibit A to the petition sets out the journal entry of that date fully authorizing the execution of the bonds, to which journal entry was attached the certificate of the clerk of the court, that such journal entry was correct. There was, however, no record upon the journal of the court of a session of the court held on that date, and the journal entry attached to plaintiff's petition and certified as correct nowhere appeared on the records of the court. When under this plea the conditions of this record were called to the attention of the court, the motion for judgment upon the pleadings was overruled, and further proceedings in the case temporarily suspended, during which time a motion was made and filed in the court by the defendant in error, asking to have entered upon the records of the court *nunc pro tunc* journal entry of the judgment of July 10, 1900, authorizing the issuance of the bonds. Notice was served upon the county attorney and county clerk of the

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pendency of such motion, at that time, and a hearing was had thereon the next day. The plaintiff in error appeared as to said motion, upon which hearing it was made to appear that the journal entry of July 10, 1900, was among the files of the court, but had never been entered of record, and testimony was offered showing a session of the court on that day, to-wit, July 10, 1900, at which time a hearing was by the court had upon the question of the issuance of the bonds of the county to fund the judgment indebtedness against the county. As a conclusion of the hearing, and by reason of the facts shown to exist, the court ordered the journal of the session of July 10, 1900, to be made of record then. Upon such record being made, the motion in this case for judgment upon the pleadings was renewed, and such motion sustained.

It is urged by the plaintiff in error that it was error to order the journal entry of July 10, 1900, to be made of record at that time *nunc pro tunc*. But we are unable to see or understand how such question can be considered in this case. No such order was made in this case, nor was the motion to enter the journal entry of July 10, 1900, filed in this case. Such motion was entitled, "In the matter of the funding of the judgment indebtedness of the county of Day and territory of Oklahoma," which was followed by the words "Motion to enter of record the journal entry of judgment relating to the issue of Day county funding bonds of July 10, 1900." The motion thereafter sets forth that it is made by the attorney general of the state of Kansas, who appeared on behalf of the state as owner of the funding bonds of Day county issued July 10, 1900, by authority of the honorable district court of that county, and asks that an order *nunc pro tunc* be entered of the journal of July 10, 1900, showing the authority of the court to issue the judgment funding bonds which were issued of that date. The motion was verified as to its allegations. An appearance was entered in the matter of such pending motion by counsel for Day county, and it was then heard by the court, resulting in the order, as above stated, directing the record of the proceedings of July 10,

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1900, to be then made. If there was any error committed in the matter of such proceedings, such error can be reviewed only by an appeal of the cause to which they relate. Such proceeding was no part of this case, and, as no appeal was taken from the order of the court directing an entry of the journal of July 10, 1900, such journal must stand of record with the same force as if recorded the date on which the judgment was found. We may say, however, touching such procedure, that we know of no reason why a person interested in a judgment of a court of record should not appear before the court at any time and ask to have the journal of the court made correct and complete as of the date such record should have been made. and, we think, the court should entertain and hear and determine such motion upon due notice to those adversely interested, and where, as in this case, the default originally was that of the court and its officials, and not of the party, we think it the duty of the court to make its records complete at any subsequent date when the default is called to the court's attention, and that this may and should be done when justice demands, without the formality of a motion, as the court upon its own motion may and should make its record complete. *Mitchell v. Overman*, 103 U. S. 65; *Borer v. Chapman*, 119 U. S. 596. It will be noticed that this procedure by which the journals of the court of July 10, 1900, were by order of the court made of record, took place while the action under consideration was pending, and, we think, that if the making of such record changed the defense of the plaintiff in error, or was a matter of such surprise as that further procedure in the case could not then be reasonably had, the plaintiff in error would have been entitled to a continuance or any necessary delay of the proceedings; but none was asked, and no appeal was taken from the *nunc pro tunc* order. The record made pursuant to such order must stand as the record of the court of July 10, 1900, and was a record of the court when the plea of *nul tel record* was overruled, and judgment was entered upon the motion for judgment on the pleadings. The plaintiff's peti-

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tion sets forth the journal entry of July 10, 1900, and, as the plea of *nul teli record* is ordinarily determined by the record, such record having been made complete, the court had before it upon the pleadings and the record all the facts necessary to a final determination of that plea.

The third defense presented by the answer of the plaintiff in error is that the county seat of Day county was established by an act of congress at Ioland, and that the district court of said county could only be legally held at such county seat, and that no court was held at Ioland on July 10, 1900, and no proceedings were there had in the district court of Day county touching the funding of the county's indebtedness. It appears from the record that on July 10, 1900, the session of the district court of Day county was held at Grand instead of at Ioland, and was being held at Grand at the time this case was heard. Under the provisions of the organic act of the territory of Oklahoma, it is made the duty of the supreme court to define the judicial districts of said territory, and to fix the time and place of each county seat in each district, where the district court shall be held, and designate the judge who shall preside therein. An order of the supreme court, therefore, fixing a term of court is made pursuant to the requirements of the organic act. A term of court in any county is only held pursuant to an order of the supreme court fixing such terms. From the record before us it appears that the supreme court of the territory had, prior to July 10, 1900, fixed a term of court for Day county for that date, and had fixed the place at Grand, and specified that such term was for the issue of county bonds. As the courts of this territory are organized, we think that judicial notice of such an order may be taken, for it is equivalent to a statute fixing a term of court, and the journal entry of a proceeding had in the court on that date is sufficient to establish the fact that the court was held pursuant to such order. All this was before the court when it finally considered the motion for judgment on the pleadings as fully as though the same had

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been established by testimony introduced for that purpose, and was probably so established as that it could not be disputed by oral testimony admissible under the pleadings; for courts will take judicial notice of their own sessions. That the term of court was held at Grand instead of at Ioland may, therefore, be regarded as settled. That Grand was the place where all the public business of Day county was and is transacted was and is a matter of such public notoriety that the court and all persons interested would take notice of, and would not and could not question or ignore it. That Ioland was the originally established county seat, is also a fact beyond controversy. That Ioland has been abandoned as a townsite for many years, and was so abandoned prior to the year 1900, is a matter of such general knowledge as that it would seem to be trifling with justice to presume that there was any controversy over the question as to where the actual seat of justice for the transaction of public business for that county was located. There remains, therefore, only the question as to whether or not the determination of the court sitting at Grand in the county of Day was a binding and conclusive determination as against parties litigant, appearing in the court and without objecting at the time, and submitting to the court their controversies to be determined by it. If Ioland was the county seat *de jure*, Grand was the county seat *de facto*, and this the district court of Day county, being a court of general jurisdiction, would take judicial notice of, and the validity of the proceedings had could not be questioned in a collateral proceeding.

In a case almost identical with this case, the supreme court of Colorado used the following language (*In re Chas. Allison*, 22 Pac. 820, 10 L. R. A. 790):

"No issue made with the definition usually given, that a 'court' consists of 'persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice'; nor is it denied that the place of meeting is an important element in the definition. We shall maintain the proposition that, under the admitted facts before us, there was a *de*

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facto location of the county seat at the town of Conejos, and that, therefore, the judgment under consideration is not vulnerable in the present proceeding. For more than twelve years Conejos has been regarded as the lawful county seat. During this period, unquestionably it has been the county seat in fact; that is, the county buildings, offices and records have, without exception, been at that place, and the county business, including that of the district and county courts, has all been transacted there. The people of the state and different departments of the state government have recognized Conejos as the place where the county seat was lawfully established. No direct judicial proceeding has ever been instituted for the purpose of determining the legality of such location in fact, or for the purpose of restoring the county seat to Guadalupe. On the contrary, the inhabitants of the county, so far as we are advised, have universally acquiesced in this disposition of the county seat. During these twelve years property has been bought and sold, and public moneys have been expended in permanent improvements at the town of Conejos, upon the strength of its being the county seat. Estates of deceased persons have been there administered upon, and the interests of minor heirs have been there adjudicated. At that place property rights of all kinds have been litigated and determined, and criminals have been tried, convicted, sentenced, and executed, or sent to the penitentiary. In this state, the power to locate and remove the county seat is lodged by the constitution exclusively with the inhabitants of the county. They may, by a popular vote, establish or change the county seat at will, save that removals cannot be made oftener than once in four years. Their absolute power over the subject is restricted only by the limitation mentioned, and the statutory regulations prescribing the manner of calling and conducting the election. The knowledge of the inhabitants of Conejos county that the county seat had in fact been removed from Guadalupe, and established at the town of Conejos, cannot be questioned, nor can we presume that, while acquiescing during twelve years in the change they have been ignorant of the manner in which it took place; and, since the entire control of the subject has always been in their hands, we are inclined to the view that their conduct in the premises should be treated as such a confirmation of the unauthorized transfer, or at least such a waiver of objection thereto, as justifies an application of the *de*

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facto doctrine, so far as judicial proceedings that have taken place under all the forms of law at the town of Conejos are concerned. This conclusion is reinforced by the facts above narrated, showing a universal outside recognition of Conejos as the *de jure* county seat during the long period mentioned. We are aware of no principal of law that compels us to hold all such proceedings void and thus entail the appalling consequences that would inevitably follow. We do not hold that there may be a *de facto* court, although this view has been vigorously and ably maintained. *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 4 Am. & Eng. Corp. Cas. 426, and note.

"When a court or office is created by statute, and when the statute creating it is unconstitutional, there is no *de jure* court or office, as the case may be (*Ex Parte Stout*, 5 Colo. 509), and under such circumstances, we have the highest authority for the view that there can be no *de facto* court or office (*Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178).

"But we are here dealing with a court unquestionably *de jure* so far as its establishment and organization are concerned—a court presided over by a judge, the legality of whose title and office is not challenged—and our position is simply that, though a county seat may have been originally unlawfully removed, but subsequent circumstances may supervene which authorize the view that the proceedings of such a tribunal at the place of relocation are valid, and forbid litigating collaterally, by habeas corpus, the regularity of the removal.

"The foregoing views do not conflict with those expressed by *Coulter v. Routt County Comrs*, 9 Colo. 258, 11 Pac. 199. A general law exists, as already suggested, providing that the district court shall be held at the county seat of the various counties. The special act considered in the Coulter case applied to the county of Routt alone. It provided for holding the terms of the district court at the town of Yampa, which was not and never had been a county seat. This court held that the act conflicted, in this respect, with the constitutional provision inhibiting special legislation 'regulating county and township affairs.' Thus it will be seen that the decision is not in conflict with the view that when the county seat itself is removed, though the removal be *de facto* merely, the place of holding the court may, under circumstances like these here presented, also be changed."

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See also *Watts v. State*, 22 Tex. 572; *Robinson v. Moors*, 25 Ill. 135; 11 Cyc. page 368 (4); 7 Am. & Eng. Cy. of Law, page 1045.

If there is any controversy concerning the county seat of Day county and the power of officials to transact public business at Grand instead of at Ioland, such controversy can be settled only in a direct proceeding for that purpose. Questions of this character have often been before the courts, and it has been the universal holding that the judgment and conclusions of courts of record cannot be collaterally attacked upon the ground that the court at the time of the transaction of the business was not held at the county seat or place designated for the holding of such court, unless the question is presented in the case and at the time of the hearing complained of. In this case, which is an action to recover upon the coupons of bonds of Day county, the execution of which was authorized by the judgment of the district court of said county, it is sought to question their validity because of the fact, as alleged, that the district court, when it authorized the execution of such bonds, was sitting at Grand instead of at Ioland. The recitations of the bonds, as well as the allegations of the journal entry authorizing their execution, show that the proceedings in the court, as a conclusion of which such bonds were authorized, were begun and had upon the application of the board of county commissioners of said county, and it appears that, pursuant to such proceeding and judgment, certain judgments of record were funded into the bonds, the validity of which are here brought in question. It would be a proceeding at right angles with equity and justice to say that the county might institute a proceeding of this kind and carry it through the courts at Grand, and, after the statute of limitations had run against the judgments funded, defeat liability upon the bonds because the proceeding in court, which the county, through its board of commissioners, was a party to, was not held at Ioland. Such considera-

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tion seems to illustrate the soundness and justice in the rule of the courts that the judgment of a court of record cannot be collaterally attacked, and can only be questioned by a proceeding in error, or by some authorized direct proceeding for that purpose. From these considerations we are of the opinion that the district court did not err in refusing to consider the defendant's third ground of defense and in rendering judgment for the plaintiff notwithstanding the grounds of defense therein stated.

One other ground of defense, the fourth, as set forth in defendant's answer, remains for consideration, which in substance is that the bonds issued were in excess of four per cent. of the last assessed valuation of the taxable property in the county. The answer alleges that such valuation was \$469,289.77, and that, considering the outstanding indebtedness of the county not funded, together with taxes levied and uncollected, and all other property, money, and resources belonging to said county July 10, 1900, not more than \$11,200.00 of the bonds of said county could, at that time, have been lawfully issued, and that, therefore, \$5,600 of such bond issue was illegal and void. By this defense the defendant seeks to try over again a question that was of paramount importance and before the court for consideration when it authorized the issuance of the bonds July 10, 1900. The record shows that at the time the court authorized the issuance of said bonds it found that the amount, including outstanding indebtedness, did not exceed four per cent. of the assessed valuation of the taxable property of Day county, according to the last assessment valuation of the assessor of said county; and the question here presented is whether or not that question may be retried in this action for the purpose of defeating a part of the bond issue of July 10, 1900. Touching this question, this court, in the case of the *Territory v. Hopkins*, 9 Okla. 149, 59 Pac. 980, said: "The court having determined the validity of the bonds involved in this proceeding and having decreed that they are valid obligations and issued in

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strict conformity with the laws of this territory, and no objections or exceptions having been made to the issuance thereof, and no appeal having been taken therefrom, the decree and judgment of the court is, therefore, final and conclusive upon all matters put directly in issue, tried, and determined in that proceeding. This doctrine has been clearly annunciated and uniformly upheld by the decisions of the supreme court of the United States." The soundness of this determination by this court is questioned by counsel for plaintiff in error, who base their conclusions upon the proposition that the district court, when hearing a question touching the issuance of funding bonds, does not reach a conclusion which in effect amounts to a judgment. If this is a correct conclusion, we can see no purpose in having the question of the issue of bonds brought before the court at all. Under the statute the court must hear and determine the question as to whether or not the issuance of such bonds are authorized under the law, and it would seem that when a court of competent jurisdiction has before it a legal question to determine, and has heard and determined that question, such determination, unappealed from, is thereafter *res adjudicata*.

It is urged that the judgment of the court of July 10, 1900, authorizing the issuing of the funding bonds in question, was not a judgment in the sense in which that expression is used, and that there was no judgment until it was entered upon the order made *nunc pro tunc*. The finding of the court July 10, 1900, was embodied in a journal entry of that date and was signed by the judge hearing the case and recited the things that were found and determined. It was a judgment as to all the intents and purposes and upon all the questions submitted to and necessary of determination by the court in order to authorize the further action had, to-wit, the issuance of the bonds. It is true it was not that character of judgment which authorized or required an execution to issue for its enforcement, but it was nevertheless a judicial de-

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termination of the existence of facts necessary to the execution of the bonds, and which facts when determined were conclusively and finally determined, unless appealed from. Such determination cannot thereafter be attacked except for fraud or want of jurisdiction. Such judgment or conclusion was executed when the bonds were signed. The entry of the judgment upon the journal of the court at a subsequent date probably served no purpose other than to make the record of the court complete in that respect.

With these questions settled, was there such evidence before the court as to justify the rendition of a judgment upon the pleadings? That the plaintiff was an innocent purchaser of the bonds is not questioned. Such bonds and coupons were negotiable instruments and passed by delivery. They were past due when the action was brought and liability thereon was denied and payment refused. The petition of the plaintiff set forth the particular bonds the coupons sued on belonged to. The recitals in the bonds from which the coupons were taken were that they were issued pursuant to the laws of Oklahoma. They bore the unquestioned signature of the officials of Day county, together with that of the judge of the district court of that county, attested by the clerk and seal of the court; also, the endorsement on the back, by the territorial auditor, who certified such bonds to be legally and regularly issued in accordance with an act of the legislature of March 12, 1897. It has been the universal holding of the courts that where negotiable bonds or securities on their face import by recital a compliance with the law under which they were issued the purchaser is not bound to look further for evidence of compliance with the law authorizing their execution. In this case they were not only issued as the act of the officials of Day county, but, in addition, the bonds recite that they are issued as the act of the district court, and, therefore, go upon the market as instruments the authority to issue which has been judicially determined. As to the effect of such recitals, and the fact that the plaintiff

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in error is bound thereby, see 62 U. S. 539, *Knox v. Aspinwell*; 99 U. S. 86, *Hackett v. Ottawa*; 105 U. S. 342, *Ottawa v. National Bk.*; 103 U. S. 683, *Walnut v. Wade*; 89 Fed. 619, *Waite v. Santa Cruz*; 65 U. S. 287, *Bissell v. Jeffersonville*.

From the record before us it is apparent that the bonds to which the coupons in question belong were regularly issued for the purpose of funding the judgment indebtedness of Day county, that when issued they were authorized by the determination of the district court of Day county, that they have passed to the plaintiff, an innocent purchaser, and that the county is liable for the full face value thereof; and we conclude that the district court did not err in the rendition of the judgment complained of.

The judgment of the district court will, therefore, be affirmed.

Pancoast, J., who presided in the court below, not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

E. J. KELLER v. S. C. HAWK.

(Filed September 5, 1907.)

(91 Pac. 778.)

1. **TAXATION—Real Estate—Sale for Taxes—Void Deed.** When a tax deed shows on its face that several lots in a town were sold at one sale, and that the county purchased them as a competitive bidder, the deed is void. While the county treasurer has the right, under the law, to issue a second tax deed for the purpose of curing defects in the first, such authority cannot be exercised to overcome, by false recitations in such second deed, the record upon which it is based.
2. **SAME—Tax Certificate—Force of Recitations.** A tax certificate, under the law, does not pass title to the land sold. It is a written certification by the county treasurer of the facts regarding the sale of real estate for taxes, and is the legal evidence upon which the holder thereof is, at the proper time, entitled to a deed, or the redemption money. It is *prima facie* evidence of the correctness of the facts recited therein, and, being made by the treasurer at or near the time of sale, where the recitations thereof are in conflict with the recitations of the tax deed based thereon, the recitations of the tax deed will prevail.

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3. **SAME—Sale—County as Purchaser.** Where a county purchases real estate at a tax sale as a competitive bidder, the sale is void, and a tax certificate or tax deed which recites such fact or other facts from which such competition is necessarily disclosed, is void.
4. **SAME—Sale of Each City Lot Separately.** Each lot in a city or town must be assessed and sold separately, and, where a tax certificate or deed shows upon its face that several lots were sold together in one sale, such certificate or deed is void.
5. **SAME—Action to Try Title—Tender of Taxes Paid.** Where one purchases real estate at a tax sale, and goes into possession of the same under a void sale and deed, and the original owner brings an action in ejectment to recover possession, he is not required, as a condition precedent to bringing the action, to tender to the tax deed holder the amount of taxes paid by him.
6. **ADVERSE POSSESSION—Evidence—Void Tax Deed.** A tax deed which is void upon its face is not admissible in evidence to support an adverse possession under a statute of limitations. A tax deed which is void upon its face cannot be aided by the statute of limitations.

(Syllabus by the Court.)

Error from the District Court of Cleveland County; before Clinton F. Irwin, Trial Judge.

Affirmed.

C. L. Botsford, for plaintiff in error.

J. W. Hocker, for defendant in error.

Opinion of the court by

BURWELL, J.: The appellee, S. C. Hawk, was the owner of lots numbered seventeen to thirty-two, inclusive, in block numbered eleven, in the town of Lexington, in Cleveland county. These lots were sold for taxes and bid in by the county. The county sold the certificate of purchase to the appellee, E. J. Keller, who, on December 24, 1898, obtained a tax deed for the same and went into possession of the lots. On October 30, 1900, the appellee commenced this action in ejectment. The appellant answered, denying generally the allegations of the petition, and then affirmatively pleaded his tax deed. On the final trial judg-

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ment was rendered for S. C. Hawk, and Keller appeals to this court.

On December 24, 1898, the county treasurer made to Keller a tax deed, but this deed showed upon its face that all of these lots were sold together, that the county bought them as a competitive bidder, and that the sale was made at the door of the court house. Recognizing that this deed was void, Keller, on November 13, 1900, obtained from the county treasurer another deed, which recited that there were no bidders other than the county; that the lots were sold separately (giving the amount for which each sold), and that the sale took place at the treasurer's office. This second tax deed was obtained after the commencement of this action. This fact, however, is not considered by us in deciding the case.

The certificate of sale was issued by R. Aniol, who was county treasurer and who made the sale. The first deed was executed by him also, and its recitations are in harmony with the tax certificate. The second deed was executed by J. W. Stow, who was elected in the place of Mr. Aniol, and took charge of the office at the end of Mr. Aniol's term. The tax certificate, under the law, does not pass title to the land sold. It is a written certification by the county treasurer of the facts regarding the sale of real estate for taxes, and is the legal evidence upon which the holder thereof is, at the proper time, entitled to a deed, or the redemption money. It is *prima facie* evidence of the correctness of the facts recited therein. These certificates are made out by the treasurer while the facts are fresh, and when there is slight probability of error of memory. And, where there is no other evidence offered as to what actually occurred at a sale, the recitations of the tax certificate will prevail over conflicting recitations in a deed executed by another treasurer some four years after the sale occurred, when the recitations in the tax certificate show that the treasurer had no legal authority to execute the deed. It is true, perhaps, that, if there were a discrepancy between the

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records of the treasurer's office and the recitations in the tax certificate, the former will prevail; but in this case the facts, as recited in the tax certificate, are not controverted. The validity of the deed depends upon the validity of the proceedings leading up to it. If those proceedings are void, the deed is void also. The only evidence offered on the trial as to what was actually done is the tax certificate and portions of the record which are not in conflict. The tax certificate recites that these lots in question were purchased by the county, it "being the highest and best bidder," and this court has held that such recitation shows that the county was a competitive bidder, and, if so, the deed is void. *Hanenratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050. And under the rule announced in the case of *Wilson v. Wood*, 10 Okla. 279, 61 Pac. 1045, the recitations of a tax deed do not overcome facts in conflict therewith, as shown by the tax certificate. In this last case the court expressly held the recitations of a tax deed might be contradicted by one claiming adversely to it. The tax certificate also shows that these lots were sold at one sale for eight dollars and seventy-three cents. This alone would render the sale void. Each lot in a city or town should be assessed and sold separately, and, while more than one lot may be included in the same deed, the deed must affirmatively show the amount for which each lot sold. *Frazier v. Prince*, 8 Okla. 253, 58 Pac. 751; *Lowenstein v. Sexton*, 18 Okla. 322, 90 Pac. 410; *Eldridge v. Robertson et al.*, reported in this volume, 92 Pac. 156.

The contention that, when a deed is defective, another deed may be issued to conform to the facts, adds nothing in favor of the appellant. The second deed should conform to the facts, and it is said in 27 Cyc. 963 that "the authority [to issue a second deed] cannot be exercised to overthrow by false recitals in a deed the records upon which it is based." That is exactly the effect of the second deed in this case. The recitals therein, when compared with the record, are false. It is also suggested by counsel for the appellant that the appellee, plaintiff below, never tendered

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the taxes to the appellant. No tender was necessary. As we have heretofore said, the tax deed was void. The United States circuit court of appeals for the Eighth circuit, in the case of *Paine v. Germantown Trust Co.*, 136 U. S. 527, said: "Where a tax sale of land is void, the payment of the taxes by the purchaser was the act of a mere volunteer, so that the landowner was not bound to pay the taxes, and interest, so paid by such purchaser, as a condition to his right to have the purchaser's certificates and deeds vacated." The supreme court of Kansas had occasion to consider the question in the case of *West v. Cameron*, (Kan.) 18 Pac. 894. That case, like this one, was a suit in ejectment. The court said: "In an action of ejectment, when it appears that the plaintiff is the owner of the property, and that the defendant holds the same under a void or voidable tax deed, as in this case, the plaintiff's action cannot be defeated by showing that the plaintiff has not tendered the amount of the taxes paid by the defendant on the land"—citing authorities. The above rule should apply in this case, especially in view of the fact that the plaintiff tendered the taxes to the treasurer and they were refused. The court, however, as a condition precedent to giving possession to the appellee, required him, in the judgment, to pay the taxes.

The appellant also insists that the action of appellee was barred by the statute of limitations, by reason of it not having been commenced within the statute after the first deed was recorded. The first deed was void upon its face. Therefore the statute of limitations did not run against it. There is apparently some conflict in the decisions upon this point, but an examination of some of these cases will show that the courts rendering them failed to distinguish between a deed which is void upon its face and one which appears upon its face to be regular, but may be defeated by reason of the irregularity of the prerequisite steps or total failure to perform some necessary duty named in the statute as the basis for a tax deed. The supreme court of the United

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States, in the case of *Redfield v. Parks*, 132 U. S. 239, in an opinion prepared by Mr. Justice Miller, reviews the authorities, and in positive language declares that the statute of limitations cannot be invoked in aid of a tax deed which is void upon its face. The court considered the statutes of Arkansas, which were equally as favorable to a purchaser at a tax sale as our own. Finally the court said:

"We do not discover in the statute of Arkansas, nor in the decisions of its courts cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void."

To the same effect are the following cases: *Coulter v. Stafford* (circuit court of appeals for the Ninth circuit), 56 Fed. 564; *Moore v. Brown*, 11 Howard (U. S.) 414; *Daniels v. Case et al.*, 45 Fed. 843, 159 U. S. 251; *Callahan v. Davis* (Mo.) 2 S. W. 216; *Land and River Imp. Co. v. Bardon*, 45 Fed. 706; *Shoat v. Walker*, 6 Kan. 65; *Sapp v. Morrill*, 8 Kan. 677; *Hubbard v. Johnson*, 9 Kan. 632. The last three cases were where the original owner of the land remained in possession, but in the case of *Watterson v. Devoe*, 18 Kan. 223, the supreme court of Kansas said that, even though the purchaser at the tax sale was in possession, the statute of limitations would not run in favor of his tax deed, which was void upon its face. The justice who wrote this opinion cites the other Kansas cases referred to above. And again, in the case of *Larkin v. Wilson*, 28 Kan. 513, Chief Justice Horton, speaking for the court, said:

"This court has already held that a tax deed, to be sufficient when recorded to set the statute of limitations in operation, must of itself be *prima facie* evidence of title; that a tax deed void upon its face will not start the statute of limitations; and also that a tax deed void upon its face will not protect a person in possession of the premises for two years thereunder."

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See, also, the following cases: *Mason v. Crowder*, 85 Mo. 526; *Sheehy v. Hinds*, 27 Minn. 258, 6. N. W. 781; *Cutler v. Hurlbut*, 28 Wis. 152; *Hofford v. McKinnon*, 23 Tex. 36. And in the case of *Hurd v. Brisner et al.* (Wash.) 28 Pac. 371, it is said: "If the sale was void [referring to a tax sale], which we think it was, none of the claims made by the appellant under the statute of limitations are good."

It is true that there are some cases holding that statutes of limitations will run against a void deed, but the weight of authority is against that doctrine, and with the latter line of authorities are the decisions of the supreme court of the United States. These decisions are binding upon this court; and, besides, we believe that the legislature did not intend that time should breathe life and force into an instrument from the face of which it could be seen that it was absolutely void. The law was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which, under the law, persons dealing with the title are bound to know.

The judgment of the lower court is hereby affirmed, at the cost of appellant.

Irwin, J., who presided in the court below, not sitting; Burford, C. J., dissenting; Garber, J., absent; all the other Justices concurring.

Charles Flohr *et al.* v. Territory of Oklahoma.

CHARLES FLOHR AND EMMA FLOHR V. TERRITORY OF OKLAHOMA.

(Filed September 5, 1907.)

(91 Pac. 712.)

CRIMINAL LAW—New Trial—Newly Discovered Evidence—Sufficiency.

A motion for a new trial upon the ground of newly discovered evidence, made after the term at which the defendant was convicted and sentenced, which motion sets forth the evidence relied on, is not sufficient to justify a new trial of the cause, unless from a consideration of it the court can determine that the result of the trial would probably have been different had such new evidence been heard upon the trial.

(Syllabus by the Court.)

Error from the District Court of Woods County; before J. L. Pancoast, Trial Judge.

Affirmed.

W. S. Denton and Robberts & Curran, for plaintiffs in error.

P. C. Simons, Att'y Gen'l, for defendant in error.

Opinion of the court by

GILLETTE, J.: In order to a consideration of this case, which is an appeal from an order overruling a motion for a new trial, made after the term when judgment was entered and sentence pronounced, upon the ground of newly discovered evidence, and in considering such motion and the ground laid therefor, it is necessary first to notice the defendants' ground of defense on the trial of the cause. They were charged with larceny by stealth and fraud in the felonious taking of merchandise, the property of C. H. and Luella Richards, at Rusk, in Woods county, Oklahoma; the indictment setting out the time and place and the property alleged to have been stolen. When the case came on for trial the defense interposed and relied upon by the defendants was set out in a statement to the jury by one of defendants' counsel, as shown by the record in the case, and was in substance that,

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while defendants were absent from their home in the state of Kansas as witnesses in a cause pending against the complaining witnesses at Wichita, Kansas, a scheme was devised, planned, and executed for the purpose of having a continuance of the case, then and there pending against Richards, and that during that time and for that purpose Richards slipped down to Flohr's place, in Woods county, Oklahoma, near Rusk, and in the night time secreted his (Richards') property upon Flohr's place, and the next morning sent an officer there and had him find the property so secreted. The property alleged to have been stolen was set out in the indictment, and a description of it required fourteen pages of closely typewritten matter, a large portion of which was recovered by a writ of replevin. Such a defense to an indictment charging the larceny of such property by fraud and stealth precludes the theory that Flohr and his wife had the possession of the property at his home at all, but substantially avers that, when the same was found there, it was by reason of the fraudulent and vicious act of Richards in secreting it there without his (Flohr's) knowledge or consent, and during his and his wife's absence from home

The evidence, upon the trial of the case showed that the property, when found at his place, was secreted in different portions of the house; some of it in the back part of and inside an organ, and some in the attic of the building; that, when Dr. Richards and his wife left Rusk, they left the key to their place of business with one Chamberlain, and that Flohr obtained possession of it from him by writing Richards, who was then in Illinois, that Chamberlain was disposing of the property and was not caring for it, and that if he (Flohr) had possession of it he would take good care of the same. Thereupon Richards telegraphed to Chamberlain to turn the key over to Flohr. Chamberlain testified that upon receipt of such telegram he did turn the keys over to Flohr. The testimony of Flohr himself upon the trial of the case upon cross-examination showed that he procured the keys and

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possession of the store from Chamberlain; that he lived some ten miles from Rusk, and had no opportunity to know what Chamberlain's acts were, and that such statements written to Richards were made in the consciousness that he did not know the facts. In this way the evidence for the prosecution upon the trial of the cause accounted for the ability of Flohr to have gotten possession of the property charged to have been fraudulently stolen. From this it will appear that Flohr's possession of the property was, upon the trial, accounted for by each side upon theories that were directly antagonistic; upon the part of the territory by proof tending to establish a fraudulent larceny of the same, and by the defendant's attempting to show that the property was fraudulently taken to his premises by Richards with a view of accusing him of the larceny thereof. These conflicting theories were settled by the verdict of the jury against the Flohrs.

Upon this motion for a new trial on the ground of newly discovered evidence it is proposed to show as a matter of defense to the charge of larceny in the indictment that the property charged to have been stolen, and which was found secreted at Flohr's house, was there by the mutual consent of the parties, through an alleged credit statement made by Dr. Richards to a business house in Wichita, Kansas, to which credit statement there was attached a written exhibit, and in which exhibit appears the following:

"I instructed Mr. Flohr, who had the keys to the store while I was away, to take all the jewelry and silverware in the store to his place, and I kept the most expensive jewelry and silverware, including * * *. I also gave him or sent him keys to my trunk where good gold watches and rings, etc., * * * and told him to take it out and put in security somewhere, in case of fire or robbery or burglary. He took all this including the musical instruments, silver mounted ebony brushes, and silver mounted combs, the best of the fancy chinaware, perfumes and some other things up to his house for safe keeping. I should think he has about a \$1,000 or \$1,200 worth of goods in this line at his place."

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This written statement is attached to the credit statement without any reference in the credit statement to the same, the person making it averring that, when Richards made it, he (Richards) said he would make a more complete property statement, which he afterwards did, and handed him the statement containing the language above quoted. The execution and delivery of this statement is positively denied by Richards and his wife, who also deny that the same is in the handwriting of either of them. The authenticity of this newly discovered evidence is, therefore, placed in much doubt, judging the same from the basis of the motion for a new trial alone. And it seems to us, when considered in connection with the defense made by Flohr upon the trial of the cause, it is so fully discredited as to justify the trial court in refusing to grant a new trial based thereon.

The defense now proposed, that Flohr received these goods under the direction of Richards and took them from the store to his dwelling house, eleven miles distant, is at direct variance with the defense stated at the beginning of the trial, to-wit, that Dr. Richards had, while he (Flohr) was absent from home in Wichita, slipped down there and secreted them in the house for the purpose of accusing him of the larceny of them. The motion for a new trial, if granted for such a reason, would be equivalent to authorizing a new trial upon such separate and distinct grounds as to permit the defendant to confess that he had originally defended the case upon false and malicious grounds, wherein he sought to charge Dr. Richards with an offense more heinous than the one charged in the indictment against himself, and, having been defeated in such falsehood, he now seeks to present the truth. Courts will not permit litigants to aver a given statement of facts to be true, and, when defeated in such averment, to have another trial upon a theory which confesses the first to have been falsely presented.

There is one other matter presented by the record deserving of notice. In the credit statement made at Wichita, Richards in the

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enumeration of his business obligations set forth an item of indebtedness to Charles Flohr in the sum of \$200, and also the fact that there was certain property at Flohr's place belonging to him, which Flohr claimed he held in satisfaction of \$200 indebtedness from Richards to him. Touching this indebtedness and this property, it appears from the record that there was a cattle deal between them wherein Flohr received some twenty-three head of cattle from Richards which had a mortgage on them, which Richards testified he considered paid in the transfer of the cattle. This transaction was made the subject of investigation on the trial of the cause. Flohr claimed that he held certain property, such as mill fixtures and a buggy and harness found in his possession, as security for this indebtedness; Richards denying that he had any right to the possession of the same for such purpose. The testimony pro and con upon this subject shows that there was an unsettled difference between them with regard to this two hundred dollars item, and the fact that Richards should make mention of it in listing his obligations in a statement of liabilities to a mercantile concern we do not think would be such a confession of fact as to justify the granting of a motion for a new trial. The important question upon the trial was not so much the matter of indebtedness of Richards to Flohr as it was the question as to whether or not the property of Richards found at Flohr's place had been by Richards hypothecated to Flohr as a matter of security or in discharge of such obligation. This Richards denied, while Flohr attempted to account for his possession by claiming that that particular property was at his place by authority of Richards, in the settlement of such \$200 item of claimed indebtedness. Such indebtedness may be admitted and Flohr still be guilty as charged. The merchantile statement of Richards, if known at the time of the trial, would have been competent as an item of evidence for the consideration of the jury, but we think not of such importance as that the verdict of the jury would have probably been changed in consideration of it.

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The judgment of the court below is therefore affirmed.

Pancoast, J., who presided in the court below, not sitting; Irwin and Garber, JJ., absent; all the other Justices concurring.

T. R. RICE and W. H. QUINETTE, *Partners Doing Business Under the Firm Name of RICE & QUINETTE*, v. C. C. HAMMOND, *Sheriff of Comanche County, Oklahoma Territory.*

(Filed September 5, 1907.)

(91 Pac. 698.)

TAXATION—Property Subject—Personalty on Military Reservations.

The taxing officers of Comanche county, Oklahoma, have the lawful right to levy and collect taxes on personal property belonging to private individuals and located on the Fort Sill military reservation, which is wholly within such county and constitutes a part thereof. The legislative power of the territory extends to all rightful subjects of legislation, and the only property which congress has prohibited the territory from taxing is the property of the United States.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Affirmed.

Parmenter & Myers, for plaintiffs in error.

S. M. Cunningham, and *Frank P. Cease*, for defendant in error.

Opinion of the court by

BURWELL, J.: T. R. Rice and W. H. Quinette were partners in the cattle business, the firm name being Rice & Quinette. They owned quite a lot of cattle which were located on the Fort Sill military reservation, in Comanche county, Oklahoma. The taxing officers assessed these cattle for territorial, county, township, and school district purposes. The owners of the cattle commenced this action against the sheriff of Comanche county (a tax warrant having been placed in his hands), praying that he be enjoined

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from levying such tax warrant upon the property of the plaintiffs. On a hearing for a temporary injunction the court enjoined the collection of the district school tax on the ground that none of the plaintiffs' property had been located within such district, and denied the injunction as to the other taxes.

The sole contention of the plaintiffs is that, inasmuch as these cattle were located on a military reservation of the United States, even though such reservation is within an organized county of Oklahoma, they cannot be taxed under the territorial laws, asserting that a military reservation is under the sole legislative control of the United States. We have read counsel's brief, and while it is true that, as long as Oklahoma remains a territory, congress may legislate as to all matters pertaining to this reservation and exclude the territorial authorities from exercising any control thereof, it has not done so. By section 6 of the organic act of the territory of Oklahoma, it is provided:

"That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil, no tax shall be imposed on the property of the United States, nor shall the lands and other property of nonresidents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right of private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

Under this express grant of power from congress, the territory may subject all property within the territory to taxation except the property of the United States. It is immaterial where the property is located. If it is not the property of the United States, the legislature may require it to bear its just proportion of the burdens of government. A military reservation in a territory is no more under the legislative control of congress than is an Indian reservation; and it has been expressly held by the supreme court of the United States that the territory may tax

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property on an Indian reservation, even though it is not located within an organized county, but only attached to an organized county for judicial purposes. *Thomas v. Guy*, 169 U. S. 264, 18 Sup. Ct. Rep. 340, 42 L. Ed. 740; *Polson v. Purcell*, 4 Okla. 93, 46 Pac. 578; *Wagoner v. Evans*, 170 U. S. 588, 18 Sup. Ct. Rep. 730, 42 L. Ed. 1154; *Steil v. Territory*, 4 Okla. 497, 46 Pac. 1117; *Truscott, Co. Treas., v. Hurlbut Land & Cattle Company*, 73 Fed. Rep. 60; *Foster v. Pryor*, 189 U. S. 325, 23 Sup. Ct. Rep. 549; *A. T. & S. F. R. Co. v. Bryan*, 11 Okla. 357, 66 Pac. 348. See, also, *Ft. Leavenworth R. Co. v. Rowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995, 29 L. Ed. 264.

Under the laws of the territory of Oklahoma the property in question is subject to taxation in Comanche county. The property of the United States located in this reservation or anywhere else in the territory cannot be taxed. The territory is expressly prohibited as to such taxation by the organic act. But should congress exclude the territory from taxing the property of the plaintiff simply because it is located on this reservation? It did not intend to do so, nor has it done so. Counsel have overlooked the fact that congress has not only exclusive legislative control over military reservations in the territories, but it has legislative control of the territories themselves. The Fort Sill military reservation is within the organized county of Comanche and constitutes a part thereof. The persons and property within such reservation have the protection of the laws of the territory, and it is only equitable that the property therein not belonging to the United States should pay a part of the expenses of the same. If congress had intended that the property on this or other reservations in the territory should not be taxed. it would have so declared, as it did with reference to property of the United States and property belonging to certain Indians. As the property in question was within an organized township of an organized county of the territory the power exists to exact taxes for all three purposes, to wit, territorial, county, and township.

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The judgment of the lower court is affirmed. Costs taxed to appellant.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent: all the other Justices concurring.

G. H. BLOCK v. W. J. PEARSON, E. T. PEARSON, *His Wife*, L. H. ROBINSON, and O. P. M. BUTLER.

(Filed September 5, 1907.)

(91 Pac. 714.)

1. **MECHANICS' LIENS—Property Subject.** By the provisions of section 4817, Wilson's Stat. 1903, one who, under contract with the husband of the owner of land, furnishes material for the erection of a building upon said land, is entitled to a lien upon such land and the improvements thereon for the amount due for such material.
2. **SAME—Leasehold Estate Subject.** A lessee, who holds under a lease from the school land leasing board, is an "owner" of land as contemplated in the mechanic's lien law, and such a lien may attach to such a leasehold estate subject to the paramount interest of the United States, the lessor, or the holder of the fee.
3. **BILL OF EXCEPTIONS—Necessity—Evidence Before Referee.** Where a referee for the trial of a cause in the district court is not ordered to report the evidence, but is ordered to hear the evidence and report his findings of fact and conclusions of law, the evidence so taken can only be made a part of the record and subject to review by the trial or supreme court by having the referee allow and sign a bill of exceptions containing the evidence taken by him.
4. **SAME—Findings of Referee—Conclusiveness.** Where the evidence taken upon a trial before a referee is not made part of the record, the findings of such referee are conclusive upon the parties as well as the court, and cannot be reviewed.
5. **SAME—Preservation of Record.** Where a party desires to have the proceedings before a referee reviewed, he should file a motion for new trial before the referee, and have the same ruled upon before the report of the referee is filed in court; and, in order to preserve a record before a referee, a bill of exceptions should be prepared and presented to the referee for his allowance and signature, to be filed in court with his report.

(Syllabus by the Court.)

Opinion of the Court.

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Reversed and remanded.

Stevens & Meyers, for plaintiff in error.

W. E. Hudson, for defendants in error.

Opinion of the court by

BURFORD, C. J.: Prior to the year 1903, one O. P. M. Butler leased from the school land leasing board section 36, township 2 north, range 12 west, reserved for school purposes, and adjacent to the city of Lawton, in Comanche county, Oklahoma. The lessee was permitted to plat a portion of the section for townsite purposes as an addition to the city of Lawton, and to sublease the lots embraced in said addition. The lots in controversy in this case were leased to E. T. Pearson, a married woman and the wife of W. J. Pearson. L. H. Robinson entered into a contract with W. J. Pearson to furnish the material and construct a dwelling house on the lots leased to Mrs. Pearson. G. H. Block furnished the material which was used in the construction of the house and received no compensation therefor. He filed a lien upon the property alleging that W. J. Pearson was the owner of the property, and that he furnished the material under a contract with the contractor, Robinson. On April 25, 1903, the plaintiff in error, G. H. Block, commenced his action in the district court of Comanche county against the defendants in error, W. J. Pearson, E. T. Pearson, L. H. Robinson and O. P. M. Butler, in which he sought to recover personal judgment against W. J. Pearson for the amount of his claim for material used in the construction of said house, and the enforcement of a lien against the property. Robinson and Butler made no defense. The Pearsons answered setting up that the title to the land was yet in the United States; that Mrs. Pearson occupied the same by virtue of a lease from Butler, who was the lessee of the school land leasing board, and that she did not purchase the material or enter into the contract for the construction of

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said house; that W. J. Pearson had no interest in the property; that he had contracted with Robinson to build the house upon his wife's lease, but that he had not made any contract with Block for the material used in the construction of said house. A reply was filed setting up the authority of Butler from the school land leasing board to subdivide the land and sublease the lots for townsite purposes. The cause was ordered to a referee for trial, with directions to hear the evidence and report his findings of fact and conclusions of law. This was done; the referee recommending a judgment for the defendants for their costs. The court approved the report of the referee and rendered judgment that the plaintiff take nothing by his action, and that he pay the costs of suit. From this judgment the plaintiff below has appealed, and the case is before us for review.

There are some questions argued in the brief of plaintiff in error that we cannot consider on the record presented. The case contains the evidence taken before the referee, but there was no bill of exceptions allowed and signed by the referee preserving the evidence, nor was there any order of the court directing the referee to report the evidence. There is no order of court making the evidence taken before the referee a part of the record, hence the evidence is no part of the record, and was not properly before the district court for consideration, nor is it before this court for its consideration. This question was before this court in the case of *Howe v. City of Hobart*, 18 Okla. 243, 90 Pac. 431, wherein we held that: "The evidence taken before a referee in a cause where the referee is directed to try the cause, making findings of fact and conclusions of law and report the same to the court, can only be preserved and made available for review in the district or supreme court by incorporating the same into a bill of exceptions, and having the referee to allow and sign the same." This rule might probably be avoided by having the court order the referee in the first instance to report the evidence taken, together with his findings of fact and conclusions of law thereon; but neither

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of these steps were followed in the case at bar, and consequently we cannot review any question which, for its determination, depends upon a consideration of the evidence. Upon this state of the record, the findings of fact stated by the referee and adopted by the court are absolutely conclusive upon all parties, as well as upon the court.

The only question we are authorized to inquire into is whether or not there was error in the conclusions of law applied to the facts found. The referee found that Mrs. E. T. Pearson was the lessee of the lots upon which the lien was claimed; that she held as the sublessee of Butler, who was the lessee of the school land leasing board; that her husband, W. J. Pearson, had no interest in the land; that he procured the building to be erected upon her lots for her use and largely at her expense, although he procured some of the means upon his own credit; that W. J. Pearson contracted with Robinson to construct the house. and that W. J. Pearson was about the premises a great deal of the time and acting as agent for his wife. In relation to the claim of plaintiff, he found as follows: "December 28, 1902, Robinson and W. J. Pearson entered into a contract whereby for the sum of \$1,000 Robinson was to build on said lot a dwelling; the material and workmanship to be first class. Plaintiff furnished materials which went into the construction of the house; the materials furnished were for prices agreed upon between plaintiff and Robinson; Pearson had full knowledge that Robinson was getting the materials from plaintiff, and knew when he paid Robinson that plaintiff had furnished materials for the house. Pearson paid the full contract price to Robinson and to others for work and material, the amount of cash paid to Robinson being \$568.40, Feb. 28, 1903. Pearson directed plaintiff to charge the materials to him and promised to pay for them. That materials which plaintiff furnished and which went into the construction of the house amounted to \$863.70, no part of which has been paid plaintiff. Pearson moved into the house in February, 1903. Pearson accepted the

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house as completed according to contract. At the time of the execution of the lease by Butler, E. T. Pearson was a married woman, and W. J. Pearson was her husband." Other findings show that Mrs. Pearson was the lessee; that Block filed his lien statement in proper time, and that Butler, the lessor of Mrs. Pearson, was the lessee from the school land leasing board of section 36, township 2 north, range 12 west, which embraces the lots in controversy. Upon these facts the referee stated as conclusions of law that the plaintiff was not entitled to a lien, for the reason that he had given no notice to Mrs. Pearson of the filing of such lien, as required by the provisions of section 4819, Wilson's Stat. 1903, and that having proceeded against a subcontractor, and alleged a sale to a subcontractor, he was not entitled to a personal judgment against Pearson. Before the cause proceeded to judgment, the plaintiff applied for and obtained leave to amend his lien statement to conform to the facts as found by the referee, so as to show that the contract was made with W. J. Pearson, the husband of the owner of the property, and to amend the petition by appropriate allegations, changing the facts to conform to the amended lien. These amendments must be treated as made, and they changed the entire theory of the pleadings. The case was tried as one against W. J. Pearson, as owner, and in which Block had furnished material to Pearson's contractor. The facts having shown that Mrs. Pearson was the owner, that W. J. Pearson was her husband, and that Block had sold the material to him to go into the construction of her house, the law as stated by the referee became inapplicable to the issues. There seems to have been no objections made to the request to amend the lien statement and petition or to the allowance of such request. The trial court followed the recommendations of the referee and rendered judgment in favor of the defendants. It seems that either the amendments of the lien statement and petition were overlooked or the statute on the subject was misapplied. The section, 4817, Wilson's Stat. 1903, governing the amended lien statement and

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petition, is as follows: "Any person who shall under contract with the owner of any tract or piece of land or with the * * husband * * of such owner, furnish material for the erection * * of any building * * thereon * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due him for such * * materials * * ". The mode of procedure to acquire the lien and to enforce same is set forth in section 4818. No other notice than that of filing the lien is, in such cases, required. The rule is obviously different from that required where the person seeking the lien has sold the material to a contractor or subcontractor.

The facts found and appearing from the pleadings and exhibits, we think, bring this case within the terms of the foregoing statutes. We think the facts and exhibits show that the plaintiff, Block, sold the material under a contract with W. J. Pearson, the husband of E. T. Pearson, the owner of the leasehold upon the land upon which the house was built; that the material was furnished for the erection of a building upon said real estate. If this position is correct, then the statute gives Block a lien upon Mrs. Pearson's interest in the real estate by complying with the requirements of the statute necessary to effectuate such lien. It is contended that the fee of the land is in the United States and that the primary disposal of the soil cannot be interfered with. These contentions may be conceded, and yet they are not fatal to this case. Our statute was adopted from the state of Kansas, where it has been in force many years and has frequently been the subject of judicial interpretation. It is there held that the term "owner" embraces a leasehold, and that the lien of the statute will attach to whatever of interest, legal or equitable, the occupant may have, subject to the paramount rights of the holder of the fee, and we think this sound in principle. *Leitz et al. v. U. P. Ry. Co.*, 16 Kan. 133; *Hathaway et al. v. Davis et al.*, 32 Kan. 693, 5 Pac. 29; *Chicago Lumber Co. v. Osborn et al.*, 40 Kan. 168, 19 Pac. 656; *Meyer Bros. Drug Co. v. Brown*

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et al., 46 Kan. 543, 26 Pac. 1019; *Chicago Lumber Co. v. Frets et al.*, 51 Kan. 134, 32 Pac. 908; *Mulvane v. Chicago Lumber Co.*, 56 Kan. 675, 44 Pac. 613. While it is true the referee states as a conclusion that Pearson made no contract with Block for the material, we think this conclusion unsound. We can only look to the findings and exhibits, but from these it is obvious that Pearson was erecting a house upon his wife's land for her use, and was looking after the affairs pertaining to the same. He directed Block to charge the material to him and agreed to pay for it. He knew Block delivered the material. The statement shows that it was charged to Pearson, per Robinson. Pearson knew it was received and used, and he knew it was not paid for at the time he paid Robinson. An order for property, and a promise to pay for it, its delivery and acceptance, constitute a valid and binding contract. It is suggested that this was an oral promise to answer for the debt of another, and not binding because not in writing. We think this a misstatement of the case. Pearson was not offering to pay the debt of another; he ordered the material for his own use; he was building the house for his wife; he was making a promise to pay his own debt, and was bound by his promise. *Trulock v. Blair*, 8 Okla. 345, 58 Pac. 1097; *Kessler et al. v. Cheadle*, 12 Okla. 489, 72 Pac. 367. We think there was manifest error upon the facts stated in holding that the lien was void.

The next contention is that the court erred in not giving the plaintiff personal judgment against W. J. Pearson for the amount of his demand. The law as stated by the referee and as applied by the court was correct as to the original lien statement and pleadings, but was erroneous as applied to the amended lien statement and petition. We think the plaintiff should have been allowed judgment against Pearson for the balance due on his account, with interests and costs.

The judgment of the district court of Comanche county is reversed, with directions to the district court to set aside the con-

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clusions of law and to restate the same in accordance herewith, or grant a new trial, as seems most consistent with justice and right.

Gillette, J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

SCARRITT-COMSTOCK FURNITURE COMPANY, *a Corporation*, v.
JOHN C. HUDSPETH.

(Filed September 5, 1907.)

(91 Pac. 848.)

1. **PRINCIPAL AND AGENT—Authority of Agent—Sale and Collection.** Authority to an agent to sell goods does not of itself and alone apparently give to the agent authority to collect pay for the goods thus sold.
2. **SAME—Burden of Proof—Collections by Traveling Salesman.** Where a traveling salesman sells goods by sample or from catalogues and price lists, sending the orders to his principal to be filled, the presumption is that such agent has not the authority to collect for such goods; and where a purchaser, subsequent to the date of ordering goods through such an agent, makes payments thereon to him, he does so at his peril, and in litigation for the value of the goods, the authority of the agent to make such collections being denied by his principal, the burden is on the purchaser to prove that the agent had such authority; and where the court instructs that such purchaser should be given credit for all payments made to such agent, unless he had notice or knowledge of the fact that such agent had no authority to collect for goods so sold, and judgment is rendered charging such payments to the seller, it will be presumed that the erroneous instructions operated to the prejudice of the seller, and a new trial should be granted by reason thereof.
3. **SAME—Authority to Compromise.** Authority to an agent to sell goods does not carry with it authority to compromise differences which may arise between his principal and those to whom he sells goods, by reason of the goods not coming up to the standard represented; and, where a purchaser relies upon a compromise with such an agent, the burden is on him to establish the agent's authority (if such fact be in dispute) to effect compromises in such cases.

(Syllabus by the Court.)

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Error from the District Court of Canadian County; before Clinton F. Irwin, Trial Judge.

Reversed and remanded.

Blake, Blake & Low, for plaintiff in error.

Joseph G. Lowe and W. T. Beeks, for defendant in error.

Opinion of the court by

BURWELL, J.: One George B. Barron, as the traveling salesman for the Scarritt-Comstock Furniture Company, sold a bill of goods to Joseph C. Hudspeth amounting in all to six hundred and forty-five dollars and eighty-seven cents, consisting of chairs, center tables, dressers, bedsteads, mattresses, and other household furniture. The bill of goods was sold from price lists and catalogue which showed pictures or cuts of the articles ordered. When the goods were received it was found that the wholesale house had made certain substitutes where the patterns ordered were out of stock, and Hudspeth claimed that the goods were not of the quality ordered. Complaint was made to the house, and Hudspeth alleges that a settlement was made with the salesman, Barron, whereby the appellant was to knock off 25 per cent. of the price, and also that he had paid Barron on the goods subsequent to the sale, in all, one hundred and sixty dollars on the account, and for which he held Barron's receipt. The appellant denied the receipt of this money by Barron, and also denied his authority to compromise the matter with Hudspeth.

On the question of presumption regarding the authority of the agent, Barron, to receive the money, the court instructed as follows:

"The jury are instructed that if they believe from the evidence that the George B. Barron mentioned in evidence came to El Reno as the agent of the Scarritt-Comstock Furniture Co., and as such agent made the sale of the furniture mentioned in evidence, then the defendant will be entitled to credit on the furniture account for any payments that he had made to said Geo. B. Barron as the agent of said company on said furniture, unless the jury believe

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from the evidence that the defendant had notice of the fact, or had knowledge that the said Geo. B. Barron was not authorized to collect for said company for said furniture, or that the circumstances and surroundings of such payment were such as to have given the defendant notice of the fact that said Barron had no authority to collect."

The instruction, in effect, tells the jury that if George B. Barron, the alleged agent of the company, made the sale in question to the defendant, then the defendant should have credit for all payments made to such agent, unless the jury believe from the evidence that the defendant had notice or knowledge of the fact that Barron was not authorized to collect for the furniture for the company, or that the circumstances and surroundings of such payment were such as to have given the defendant notice of the fact that Barron had no authority to collect.

The giving of the instruction was reversible error. The presumption of law is that one who is not in possession of goods, and who sells the same on credit, has not the authority to subsequently collect therefor, and the burden is on one making such payment to such an agent to establish by a preponderance of the evidence that the agent has authority to collect. The presumption is that such authority has not been conferred, unless the agent is in possession of the goods sold. In 1 Am. & Eng. Enc. of Law (2 Ed.) page 1014, it is said:

"Where the principal has clothed the agent with the indicia of authority to receive payment, as by entrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of the sale. But when the agent has not the possession of the goods, and no other indicia of authority, and is only authorized to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive payment."

"An agent selling on credit has no implied authority to subsequently collect the price, unless the principal has held him out to third persons as having authority to receive payments."

And again on page 1016 of the same book, it is declared:

"Independent of a controlling usage to the contrary, a travel-

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ing salesman or agent merely to solicit orders for goods has no implied authority to receive payment therefor."

The following cases support the rule above declared: *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490; *Graham v. Buckwall*, 8 Bush. (Ky.) 12; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Chambers v. Short*, 79 Mo. 204; *Abraham v. Weiller*, 87 Ill. 179; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745; *Higgins v. Moore*, 34 N. Y. 417; *Crosby v. Hill*, 39 Ohio St. 100; *McKinley v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Karneman v. Monaghan*, 24 Mich. 36; *Meyer, Bennerman & Co. v. Stone & Co.*, 46 Ark. 210, 55 Am. Rep. 577; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Clark v. Smith*, 88 Ill. 298; *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Seiple et al. v. Irwin et al.*, 30 Pa. St. 513; *Janney v. Boyd*, 30 Minn. 319.

The burden was also on the defendant to show by a preponderance of the evidence that the salesman, Barron, had authority to compromise the difference with Hudspeth.

It may be that the evidence was sufficient to authorize the jury in finding for the defendant even under the rule announced in this opinion. This, however, is not necessary to decide. The authority to collect from Hudspeth and to make the compromise or settlement claimed by him to have been made were issues of fact, and, the burden having been placed on the appellant under the instructions, when the law placed it upon Hudspeth, the presumption is that the appellant had been prejudiced by reason thereof.

The judgment of the lower court should be reversed, and the case remanded, at the cost of the appellee, and a new trial granted. It is so ordered.

Irwin, J., who presided in the court below, not sitting; all the other Justices concurring.

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G. W. GARRISON v. SAMUEL H. KRESS AND CLAUDE W. KRESS.

(Filed September 20, 1907.)

(91 Pac. 1130.)

1. **EVIDENCE—Parol Evidence Contradicting Written Contract.** A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts.
2. **SAME—Merger of Oral Negotiations.** The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

(Syllabus by the Court.)

Error from the Probate Court of Oklahoma County; before Wm. P. Harper, Trial Judge.

Affirmed.

Grant & McAdams, for plaintiff in error.

J. H. Everest and C. F. Smith, for defendants in error.

STATEMENT OF THE CASE.

On or about the 23rd day of July, 1904, Samuel H. Kress and Claude W. Kress leased to G. W. Garrison two upper stories of a certain brick building on lot nine (9), in block thirty-five (35), in the city of Oklahoma City, Oklahoma, to be used in connection with the Illinois Hotel, which the said G. W. Garrison at that time occupied. Prior to the completion of the said building, which was to be used in connection with the said hotel, the said G. W. Garrison sold out his interests in the Illinois Hotel, and assigned his lease on the proposed annex to said hotel to the purchaser, one Mrs. M. J. Wade. The lease provided that the lessee could assign same without the consent of the lessors. The lessee, G. W. Garrison, claims that prior to the signing of said lease and the de-

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livery thereof he had entered into a separate and collateral agreement with the lessors, whereby it was agreed, stipulated, and understood that, in case said lessee assigned said lease, and was not in arrears with the rent at the time of assignment, he should be relieved, personally, from all liability under and by virtue of the terms of said lease contract; that this agreement was a condition precedent to the signing of said lease contract, and that the same would not have been signed and accepted by him but for the oral stipulations above referred to. The plaintiff in the court below brought an action against Garrison for the rent in arrears on said contract. The trial court refused to permit the defendant Garrison to testify as to the terms of said oral agreement, or to testify as to whether there was an oral agreement between the parties. The trial court also refused to permit defendant to show that the plaintiffs had assumed control of the premises by attempting to lease them to other parties, to which ruling of the court the defendant excepted. At the conclusion of the testimony, the court directed the jury to find a verdict for the plaintiff, which was done, to which defendant excepted. Motion for new trial was filed, overruled, and exceptions allowed, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: The sole and only question raised in this case by the brief and argument of plaintiff in error, and the only ground assigned as error for a reversal of this case, is the action of the court in refusing the evidence as to the oral agreement. We take the proposition to be elementary that all prior and contemporaneous oral agreements as to matters involved in a written contract are merged in the written contract, and that the written contract cannot be changed or varied by such prior and contemporaneous parol agreements. Our statute, in our judgment, conclusively settles this proposition. Section 781, Wilson's Statutes of Oklahoma 1903, is as follows:

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"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

The supreme court of this territory, in the case of *Deming Investment Company v. Shawnee Fire Insurance Co.*, 16 Okla. 1, 83 Pac. 918, says:

"A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence unless in case of fraud or mutual mistake of facts."

The same doctrine is laid down by this court in the case of *Liverpool & London & Globe Insurance Company v. Richardson Lumber Co.*, 11 Okla. 585, 69 Pac. 938.

On the strength of this statute and these cases, the decision of the probate court is affirmed, at the costs of the plaintiff in error.

Pancoast and Garber, JJ., absent; all the other Justices concurring.

BENJAMIN F. RYLAND V. ARKANSAS CITY MILLING COMPANY, a
Corporation, of Arkansas City, Kansas.

(Filed September 20, 1907.)

(92 Pac. 160.)

1. **EXECUTION—Ancillary Proceedings—Property Applicable to Judgment Upon Order.** Under proceedings in aid of execution based upon a showing that the judgment debtor has in his possession and under his control property not exempt from execution which he refuses to apply in payment of the judgment, the court is not authorized to make an order directing the judgment debtor to apply property, the title to which is shown to be in a third party. The judgment debtor can only be ordered to apply property, the title to which is in him, and which he is competent to deliver.
2. **WRIT OF ERROR—Appealable Orders—Ancillary Proceedings.** An order directing the judgment debtor to apply certain property

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to the satisfaction of the judgment, made in proceedings in aid of execution, is an order affecting a substantial right, made in a special proceeding in a case after judgment, and is appealable.

(Syllabus by the Court.)

Error from the Probate Court of Logan County; before C. W. Goodrich, Probate Judge.

Reversed and remanded.

Jno. Devereux and John J. Hildreth, for plaintiff in error.

Herod & Soward, for defendant in error.

STATEMENT OF THE CASE.

This is a proceeding supplemental to an execution to compel the satisfaction of a judgment. The plaintiff filed an affidavit on July 21, 1903, from which it appears that on the 15th day of July, 1898, a judgment was rendered in the probate court of Logan county in favor of the Arkansas City Milling Company against Benjamin F. Ryland for the sum of \$290.89 and costs of suit taxed at \$2.50, with interest at 6 per cent. per annum until paid; that an execution was issued thereon and placed in the hands of the sheriff of Logan county for service; that the sheriff returned said execution unsatisfied; that the debt at the date of the affidavit amounted to the sum of \$380.65; that Ryland was a resident of Logan county, where said judgment was rendered; and that the said Benjamin F. Ryland, judgment debtor, has property which he unjustly refuses to apply towards the satisfaction of said judgment, and a request was made for an order directing the defendant to appear and answer under oath concerning his said property. Based upon said affidavit, the probate judge issued an order directing the judgment debtor to appear before said judge on the 27th day of July, 1903, then and there to answer under oath concerning his property, and the application of such property to the payment of plaintiff's judgment, interest, and costs. Pursuant to said order, on the 27th day of July, 1903, the judgment debtor, Ryland, appeared, and, after introducing certain preliminary proof, the plaintiff caused Ryland to be sworn as a

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witness and proceeded to examine him as to his property. He testified that he made homestead entry upon the east half and the southwest quarter of section 13, township 17 north, range 4 west, and made final proof thereon; that he conveyed this land to his wife to enable her to borrow some money; that she mortgaged the tract for \$600, and traded for another tract, the northwest quarter of section 7, township 17 north, range 3 west; that these transactions occurred about three years previously, and that his wife was still the owner of said tracts of land. He also testified that his wife was the owner of the northeast quarter of section 13, township 17 north, range 5 west, and also certain lots in the town of Crescent, upon which is located a cotton gin; that his wife rented the farms and had them cultivated, while he managed the cotton gin for her upon a monthly salary of \$40.00; that each of the pieces of real estate was mortgaged for from \$400 to \$700 each, and the income from the farms and cotton gin business had mostly been consumed in operating and living expenses; that he owned no property whatever, and had in the real estate only the value of a team of mules and some other insignificant articles. The homestead was shown to be worth \$3,000, another of the farms \$2,500, and the other \$700. It appeared that Mrs. Ryland had accumulated all this property from the \$600 borrowed by her upon the homestead, and the efforts of her husband acting as her manager. She also owned some live stock and farm implements.

Upon this showing the probate court found as follows: " * * That the said Benjamin F. Ryland has property, consisting of the N. W. quarter of section 7, township 17 N., range 3 west of the Indian Meridian; the N. E. quarter of section 13, in township 17 N., range 3 west of the Indian Meridian, and certain property in Crescent in said county, consisting of cotton gin and the lots upon which it is situate, not exempt by law from execution, and in addition to any current wages; that all of said property is the product of his skill, labor, and management, and is in addition to the keeping of himself and family, and that the same

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should be applied to the payment of the judgment, interest, costs, and accruing costs in the above entitled action." Upon said finding the following order was made: "It is therefore considered, ordered, and adjudged by the court that the same shall be applied, and the said Benjamin F. Ryland is hereby directed and ordered to so apply said property and to pay said judgment, interest, and costs, and accruing costs, within thirty days from the date hereof. To which order the defendant at the time excepted." From this last order the appeal is taken to this court.

Opinion of the court by

BURFORD, C. J.: The first contention of plaintiff in error is that, the proof having shown that the title to the property was in Mrs. Ryland, who was not a party to the proceeding, the court had no power to order Ryland to apply it to the satisfaction of the judgment. These proceedings are based upon certain statutory provisions. It is provided in section 4674, Wilson's Stat. 1903: "After the issuing of an execution against property and upon the affidavit of the judgment creditor, his agent or attorney that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the probate judge or judge of the district court of the county in which the order may be served, may, by order, require the judgment debtor to appear at a time and place in said county, to answer concerning the same, and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as hereinafter prescribed." Section 4681: "The judge may order any property of the judgment debtor, not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, and may enforce the same by proceedings for contempt in case of refusal or disobedience."

It was pursuant to the authority conferred by these sections

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that the probate court made the order herein complained of. There are other provisions of the same statute authorizing proceedings against third persons who may be indebted to or have property belonging to the judgment debtor, and for the appointment of a receiver where necessary for the purpose of making conveyances, disposing of property, or of conserving rents and profits, but none of these steps were resorted to, and we are confined to the bare question whether the court can, in proceedings in aid of execution, order a judgment debtor to apply property, the title to which is in another, to the payment of his indebtedness, even though it be found that it was fraudulently conveyed for the purpose of defeating the judgment.

It was said in the O'Connell case, 49 Kan. 415, 30 Pac. 456, which was a habeas corpus proceeding to discharge from an order adjudging the judgment debtor in contempt for failure to comply with an order: "There are two fatal objections to the order of the judge committing the petitioner to the jail of Shawnee county. The order does not specify the kind of property or state the amount of money the petitioner had in his possession, neither does it describe the property under his control. This we think was necessary. He may not have had property and money sufficient to satisfy the judgment. If he had not, it would hardly be contended that he should be imprisoned for refusing to comply with an order that he was powerless to obey. In proceedings in aid of execution, where an examination has resulted in the disclosure that the debtor unjustly refuses to apply money or property which he has in his possession or under his control to the satisfaction of a judgment rendered against him, the practice is for the court or judge to order the judgment debtor to deliver over a sufficient sum of money or turn out property enough to satisfy such judgment and costs, and then, if he wilfully disobeys such order, the same may be enforced by proceedings for contempt, and under such proceedings the district judge may commit him to the jail of the county until the judgment and costs are satis-

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fied." In the case of *In re Burrows*, 33 Kan. 675, 7 Pac. 148, the court was careful to say that the judgment debtor could be compelled to apply money or property in his possession or under his personal control.

Under a statute similar in terms and having for its object the same purpose, Judge Denio, in *Raynor v. James*, 17 N. Y. 317, said: "The general object of the proceeding is to enable the creditor to enforce the execution of a judgment already obtained. Before a step can be taken, a competent court must have adjudged against the debtor the amount of debt or damages claimed. The magistrate before whom the proceedings are had can give no judgment or make any order affecting in the slightest degree the rights of any person claiming to hold property under title derived from the debtor. The remedy afforded the creditor is the compelling of the debtor, under pain of imprisonment, to hand over for the use of the creditor to be sold and applied on the judgment such property as he may own, and to create a trustee for the creditors in whose name the trustees of the debtor, or persons owing him or having his property in their hands, may be prosecuted for the benefit of the creditors. * * * In the summary proceedings under consideration, all litigation between the creditor and a third person is prohibited. It is only in cases of property held confessedly and nakedly for the use of the debtor that the process can operate at all upon a third person. The officer can try no question of trust or fraud." In *Barnard v. Kobbe*, 54 N. Y. 516, it was said: "To authorize an order under section 297 of the code, the property to be applied to the payment of the judgment must belong to the judgment debtor. If any other party claims an adverse interest in it, the question must, by the very terms of the statute, be settled in an action to be tried according to the ordinary forms of law. Enough appeared upon the examination of Kobbe to show, either that Arnstein had not even *prima facie* title to the money, or that the plaintiff claimed an interest in it. In either case the order was made without authority of law." In

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Rodman v. Henry, 17 N. Y. 482, it was held that: "Where, on examination of a judgment debtor under proceedings supplemental to execution, it appears that he is in possession avowedly as the agent of a third person of property claimed by such person under a paper title apparently good, it is improper to order a delivery of the property to the receiver. The proper remedy is for the receiver to bring an action against the claimant to test the question of ownership."

It was decided by the supreme court of Wisconsin, in *Blabon et al. v. Gilchrist*, 67 Wis. 38, as follows: "The provisions of section 3035, which authorizes the court or judge to order any property of the judgment debtor in the hands of himself or any other person to be applied towards the satisfaction of the judgment, does not conflict with such intent, as it is clear from reading the whole section that such power can only be exercised in those proceedings when there is no dispute about the ownership of the property or as to the amount of the debt due to the judgment debtor by such third person. The proceeding so far as it is an adversary proceeding is solely against the judgment debtor, and no issue can be tried by the commissioner between a third person and the plaintiffs in the judgment, as to the fact whether such third person has property in his hands belonging to the defendant."

The supreme court of Ohio, under the same statute, has adopted the same rule of practice. In *White v. Gates*, 42 Ohio St. 109, the court, in commenting upon the right of a third person claiming the property sought to be reached, said: "The proceeding in the probate court was not such suit, or a substitute for it, but a proceeding summary in its character, in the nature of a proceeding *in rem*, designed to appropriate the property of a judgment debtor in the hands of a third person, to the payment of the judgment, where the person having possession of the property asserts no claim to it and voluntarily assents to such appropriation. And while the judge may order the person having the property to deliver the same to a receiver, although the person so hav-

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ing possession claims to own it, the judge has no power to enforce the order as for a contempt, however plain it may seem to him that such claim of ownership is wholly unfounded, but the receiver must resort to the ordinary remedy by action." And this ruling is further supported by *Union Bank v. Union Bank*, 6 Ohio St. 254; *Edgerton v. Hanna*, 11 Ohio St. 323.

The supreme court of North Carolina, in *Coates Bros. v. Wilkes*, 92 N. C. 376, construing a similar statute, says: "If it appear that the debtor has funds or property in his own hands, the court may by proper order apply the same to the judgment; but, if the title to the property alleged or claimed to be that of the debtor, in fraud of creditors, in such way as that it cannot be promptly reached by execution or the order of the court, then a receiver may be appointed at once."

California has adopted practically the same rule. *Parker v. Page*, 38 Cal. 522; *Hartman v. Olvera*, 51 Cal. 501; *Ex Parte Hollis*, 59 Cal. 405; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128.

The state of Nevada has the same statutory provisions, and the supreme court of that state, in *Haggerman v. Tong Lee*, 13 Nevada 331, said: "When these various sections are considered together, it seems perfectly plain that the judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed. If the plaintiff only claims, as in this case, that the person under examination is indebted to the judgment debtor, then the judge or referee can only order such person to pay over the money when such person admits the indebtedness and acknowledges his ability to pay the amount due, or these facts are established by other equally clear and indisputable evidence. If there is any dispute as to the ownership of the property, or if the person proceeded against in good faith denies the debt, neither the judge nor the referee has any power or authority whatever in these proceedings to decide the disputed question and order the property delivered or money adjudged to be due to be paid over in satisfaction of the judgment."

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The following cases announce the same doctrine: *Thompson et al. v. Guentkner et al.*, 5 S. D. 504; *Allen v. Tritch et al.*, 5 Colo. 222; *Stearns v. Eaton*, 17 N. Y. Supp. 687; *Shannon v. Steger*, 78 N. Y. Supp. 163; *Roy v. Baucus*, 43 Barbour (N. Y.) 310; *Winters v. McCarthy*, 2 Abbott's New Cases (N. Y.) 357; *Wallace et al. v. McLaughlin* (Utah) 43 Pac. 109.

These decisions, construing statutory provisions either identical or similar to ours, are unanimous in holding that in proceedings in aid of, or supplemental to, execution, where the inquiry is based upon an averment that the judgment debtor withholds property or has in his possession property which he refuses to apply to the payment or satisfaction of the judgment, it is discovered that he has property to which a third party claims title, or which is not under his personal control, the court has no power to order him to turn it over to the officer or to direct him to apply it to the judgment. In this case the examination of the judgment debtor developed the fact that he has no property in his possession except the real estate described in the order, the title to which was in his wife, and he was making no claim to it. However much the court may have been convinced that the property was fraudulently held by the wife and that the judgment debtor was in fact the owner, such question could only be determined in a proceeding where the wife was a party and had her day in court to have her rights and interests determined. He could not apply this property because the title was not in him, and the court should not order him to do an act which required of him the impossible. The probate court erred in making the order appealed from in this cause.

The courts of the different states are not in harmony as to the remedy in such cases. Some hold that the judgment creditor should obtain the appointment of a receiver and get leave of the court for the receiver to sue the third party to recover the property fraudulently held or held as trustee for the judgment debtor. All hold that the judgment creditor may have his suit

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in equity to set aside the fraudulent conveyance and subject the property to the payment of the judgment. The statute (section 4678, Wilson's Stat. 1903) gives the additional right to the judgment creditor to compel third persons indebted to or having property of the judgment debtor to submit to an examination in respect thereto. Such proceedings are recognized in other jurisdictions. 17 Cyc. 1430.

The defendant in error contends that the order appealed from in this case is not a final order, and is not such an order as from which an appeal will lie. In defining a final order from which an appeal will lie, it is provided in section 4735, Wilson's Stat. 1903: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment and an order affecting a substantial right, made in a special proceeding, or upon a summary application after judgment, is a final order which may be vacated, modified, or reversed, as provided in this article." The order in this case is "an order affecting a substantial right, made in special proceeding after judgment," and is a final order and appealable. *Knight v. Nash*, 22 Minn. 452; *Lamonte v. Pierce*, 34 Wis. 483; *Forbes v. Willard*, 54 Barb. (N. Y.) 520; *McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364; *Cook v. City Nat'l Bank*, 73 Ind. 260; *West Side Bank v. Pugsley*, 47 N. Y. 368.

The order and judgment of the probate court of Logan county is reversed, at the costs of defendant in error, and the cause is remanded for such further proceedings as may be authorized by law.

Pancoast and Garber, JJ., absent; all the other Justices concurring.

Gault Lumber Co. v. Wm. H. Pyles *et al.*

GAULT LUMBER COMPANY V. WILLIAM M. PYLES AND THE MINOR HEIRS OF MRS. WILLIAM M. PYLES, TO-WIT, FRANKIE A. PYLES, ROY PYLES, HAZEL PYLES, MARVIN PYLES, AND ROLLIN PYLES, *by their Next Friend*, MARY A. STANLEY.

(Filed September 20, 1907.)

(92 Pac. 175.)

1. **SPECIFIC PERFORMANCE—Contract—Sale of Land—Parties.** A court of equity cannot enforce the specific performance of a contract to sell real estate against several joint owners where all the joint owners were not parties to the contract.
2. **GUARDIAN AND WARD—Power of Guardian—Contract to Sell Land.** An agent or guardian of an infant owner of real estate has no power to make an executory contract for the sale of the infant's real estate. Such a sale can only be made upon an order of the probate court and subject to the court's approval.
3. **BROKERS—Authority to Sell—Requisites.** The written authority of an agent to sell real estate and bind the owner by an executory contract must be certain and specific as to terms and description.
4. **SAME—Construction of Authority.** A letter written by an owner of real estate to a real estate broker, placing the property in the hands of the broker for sale, will ordinarily be construed as an authority to the broker to find a purchaser, and not as an authority to sell and bind the owner.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before B. F. Burwell, Trial Judge.

Affirmed.

Snyder & Clark, for plaintiff in error.

J. H. Everest, for defendants in error.

STATEMENT OF THE CASE.

This was an action in ejectment brought by the defendants in error, William M. Pyles and the minor heirs of Mrs. William M. Pyles, deceased, against the Gault Lumber Company, a cor-

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poration, to recover possession of lot 29, in block 4, in Oklahoma City. The plaintiffs alleged that they were the owners and entitled to the possession of the real estate described, and that the defendant was in possession and refused to vacate, and judgment was asked for possession and damages for detention. The defendant filed an answer in which it admitted that the plaintiffs held the legal title to said lot, and that it was in possession of the same, but alleged that William M. Pyles authorized an agent in writing to sell said real estate for \$400 cash, and that it purchased said lot from said agent and paid the sum of \$50 upon the purchase price and went into possession of said property and had made valuable and lasting improvements thereon, and it offered to pay the balance of the purchase money, \$350, and demanded specific performance of said contract of purchase. The plaintiffs replied by general denial. The cause was tried to a jury. Upon the trial the plaintiffs introduced proof of their title and the possession by the defendant and rested. The defendant then showed that Pyles had written a letter to the agent from whom it purchased the property, in which he stated "that he would take \$400 for the lot," and told him "that he might sell it." This letter was lost and it does not appear that any effort was made to have Pyles produce a copy or to admit its contents. The agent made an oral agreement with W. D. Gault, manager of the lumber company, to sell the lot to the company for \$400, and Gault agreed to take it. He paid the agent \$50, and agreed to pay the balance of \$350 when the deed was delivered. The sale was reported by the agent to Pyles, who at the time was residing in Indian Territory, and he sent a deed to the agent, executed by him, and conveying the lot to the Gault Lumber Company. Mr. Gault took the deed to his attorney, who examined it, and after which Gault returned it to the agent, and refused to accept it because it was not executed by or on behalf of the minor heirs who owned an undivided interest in the real estate. Pyles at the time had no authority to sell the real estate of the minor heirs. Proceedings were begun

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in the probate court of Oklahoma county for the purpose of obtaining an order of that court for the sale of the interest of the minor heirs, but no such order was ever made. After Gault had rejected the Pyles' deed and knew of the defect in the title, and that the minor heirs had not, through any authorized proceeding, agreed to the sale of the lot, the lumber company moved its business onto the lot and put about two hundred loads of dirt on the lot to fill it up for business purposes. After this had been done, Pyles called upon the agent and procured the rejected deed. He refused to accept the \$50 held by the agent, and joined with the infant owners in bringing this action. Upon the showing above made, the court directed a verdict for the plaintiffs, and gave judgment for possession, and this is assigned as error.

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BURFORD, C. J.: Upon the admitted facts in the pleadings, the plaintiffs were entitled to judgment in their favor, unless the defendant established such a valid contract of purchase and sale as a court of equity would award a specific performance of. The theory of the plaintiff in error is that Pyles gave the agent written authority to sell the lot in question, and that the agent made an oral sale to the Gault Lumber Company; that it paid part of the purchase money and went into possession and made lasting and valuable improvements on the lot, and tendered the balance of purchase money and demanded a deed of conveyance. This theory, if established, would, in equity, entitle the defendant to a specific performance of the contract. But we think the proof fails of establishing the theory. In the first place, Pyles was not the sole owner and had no authority to sell the lot; he could at best only sell his undivided interest. The infant owners could neither contract in writing or orally to sell their interest, nor could they authorize an agent or guardian to sell. The purchaser was bound to know this as a matter of law. Nor could Pyles, as the guardian of the infant owners, make any contract of sale that would be

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legal until he had first procured an order of sale from the probate court, and then any such agreement must have been subject to the approval of such court. The district court had no authority to enforce the contract of Pyles to sell the real estate of the infant heirs, even had he made such an agreement, and for this reason alone the court was justified in directing a verdict for the plaintiffs.

Nor do we think there was shown such a written authority of the agent to sell as will take the case out of the statute of frauds. An authority of an agent to sell real estate, in order to bind the owner by executory contract, must be specific and certain as to terms and description. Ordinarily, when property is placed in the hands of an agent to sell, the authority conferred is only held to be the authority to find a purchaser at a given price and submit the same to the owner, and not an authority to sell and bind the owner. The authority shown by the evidence does not take this case out of the general rule, and in the absence of more specific and definite authority to the agent to sell the real estate and enter into a contract of sale to bind the owners, the court committed no error in directing a verdict.

There is a further reason why the defendant should not have prevailed upon the proof made. If the agent had authority to sell the real estate, it was for the sum of \$400 cash. The defendant never made such a contract with the agent as the authority of the agent would warrant. He had no authority to sell for \$50 cash and the balance when the defendant should be satisfied with the title. Nor do we think the defendant showed such equity as would entitle it to a specific performance of the contract. It never went into possession of the lot or expended any money or labor upon it in the way of improvements until after the Pyles deed had been refused, the defect in the title discovered, and the refusal of Pyles to carry out the contract was made known to it. The company was not misled or deceived to its detriment, but went onto the lot with its eyes open and the obstacles all apparent. The posses-

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sion and part payment which will take a case out of the statute of frauds must be a possession authorized by the owners of the property, and must have been taken in good faith, and not fraudulently obtained. No right in equity can be founded upon a trespass or unauthorized possession. *Eberville v. Leadville Mining & D. Co.* (Colo.) 64 Pac. 200; *McKinnon v. Nixon* (Ala.) 29 So. 690; *Cockrell v. McIntyre* (Mo.) S. W. 648.

The case made by the defendant falls within the law as stated by this court in the cases of *Fox v. Easter*, 10 Okla. 527, 62 Pac. 283; *Halsell v. Renfrow et al.*, 14 Okla. 674, 78 Pac. 118; *Id.*, 202 U. S. 287.

The judgment of the district court of Oklahoma county is affirmed, at the costs of the plaintiff in error.

Burwell, J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

JERRY YATES AND JAMES YATES, *Partners as* YATES BROS., v.
R. J. GARRETT.

(Filed September 20, 1907.)

(92 Pac. 142.)

1. **EVIDENCE—Experts—Definition.** An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons.
2. **SAME—Expert Knowledge—Reception.** Where the testimony of a witness shows him to be an expert in the matter concerning which he gives his opinion, Held, that this testimony was properly received as that of an expert, although he, for some unexplained reason, disclaimed being such.
3. **SAME—Preliminary Question—Discretion of Court.** Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court, and the rule is, if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive

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or exclude the evidence, but the supreme court will not reverse any such a case unless the ruling is manifestly erroneous.

(Syllabus by the Court.)

Error from the Probate Court of Noble County; before Ethan Allen, Probate Judge.

Affirmed.

H. B. Martin and D. M. Tibbetts, for plaintiffs in error.

Doyle & Cress, for defendant in error.

STATEMENT OF THE CASE.

On the 6th day of September, 1904, R. J. Garrett commenced his action against Yates Brothers, in the probate court of Noble county, for the sum of \$990 damages which he alleged he had suffered by reason of the defendant having permitted certain cattle alleged to have been affected or infected with a contagious and infectious disease, known as "Texas Fever," to stray into the pastures of Garrett and communicate to Garrett's cattle such disease, from which it is alleged Garrett's cattle died, resulting in great loss to him. Yates Brothers having answered by general denial, the cause was tried on the 14th of November, 1904, to the court, without a jury, resulting in a judgment in favor of Garrett and against Yates Brothers for \$900 and costs. On the 17th day of November, 1904, Yates Brothers filed their motion for a new trial, and on the 19th of November, 1904, said motion was overruled, and to all of which Yates Brothers duly excepted, and prosecutes these proceedings to reverse said judgment.

Opinion of the court by

IRWIN, J.: In the brief and argument of counsel for plaintiff in error two grounds are alleged for a reversal of this case: First, that there was no competent evidence introduced on the trial to show either that Yates Brothers' cattle were infected with any contagious or infectious disease, or that Garrett's cattle contracted any such disease, or that Garrett's cattle died of any such disease; and, second, that the court erred in admitting incompe-

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tent evidence to show the presence of Texas fever in the cattle in question. Both of these assignments can be properly treated together, and the field of inquiry in this investigation is confined within a very narrow margin from the fact that only one proposition is discussed in the brief of counsel for plaintiff in error, and under the well recognized rule of this court, that where many propositions are advanced as assignments of error, and only a few of them are argued in the brief, the court will treat all that are not so argued as having been abandoned. So, in considering this case, we will only investigate and decide the propositions which are urged by counsel for plaintiff in error in their brief. Succinctly stated, this is that there was no competent evidence that these cattle died of Texas fever. All other questions that might have arisen in the trial of the case, and all other exceptions that were or might have been saved, are entirely eliminated from this opinion, because they have been treated as abandoned by counsel for plaintiff in error in writing his brief. We find, upon an examination of this case, that there were called upon this proposition, five witnesses, two of whom, on their examination as to their qualifications, admitted that they had had no experience and possessed no particular knowledge of the disease known as "Texas Fever." The other three claimed to have some knowledge. Holcomb, the third witness called, said that he had had some experience and had seen cattle infected with the disease known as "Texas Fever," twice in the state of Kansas, and on three occasions in Oklahoma; that he had lost 23 head of cattle with this disease, and had seen other cattle in Oklahoma with the disease, and described the manner in which this disease was communicated from one animal to another. Seton, the fourth witness, testified to having had some experience with Texas fever, and, having seen cattle with this disease two years before, he was called as a witness. Hagerman, another witness, had had experience with the disease and had cattle die with the Texas fever, and from his experience with the fever, was of the opinion he could tell when cattle had the disease. All

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of these witnesses believed that these cattle died with the Texas fever. Counsel for plaintiff in error insist that this testimony is not competent, because it is not within the strict rule of expert testimony. But we take the rule to be: That where a witness has had experience, as a farmer and cattle raiser, with cattle which are infected with this disease, he is sufficient of an expert to be allowed to give his testimony; the weight and effect of that testimony to be determined by the court or jury; that in such cases the party is not confined to what is known as strictly and exclusively expert testimony. Counsel for plaintiff in error cite in their brief some very learned decisions from the Kansas supreme court defining who are, and who are not, experts. These decisions of the Kansas court are no doubt sound as to the law, but we fail to see that they have any application in this case, as we do not understand the Kansas supreme court to say that questions of this kind can never be determined except by medical or expert testimony. The better rule is the rule adopted by the United States supreme court in the case of the *Spring Company v. Edgar*, 99 U. S. 645. That court in the opinion, on page 658, says: "Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court; and the rule is that, if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case unless the ruling is manifestly erroneous"—citing, in support of this doctrine, *D. & C. Steam Towboat Co. v. Starrs*, 69 Pa. St. 30; *Page v. Parker*, 40 N. H. 48; *Tucker v. Massachusetts Central Railroad*, 118 Mass. 546. And, in the same opinion, the United States supreme court say: "Even if the witnesses are not properly to be regarded as experts, the court is of the opinion that the testimony was properly admitted as a matter of common knowledge." In 2 American & English Encyclopedia of

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Law (2d. Ed.) page 424, it is said: "An expert is one possessing, in regard to a particular subject or département of human activity, knowledge not acquired by ordinary persons." In the case of *Walker v. Scott*, reported in 61 Pac. 1091, the Kansas supreme court say: "Where the testimony of a witness showed him to be an expert in the matter concerning which he gave his opinion, held that his testimony was properly received as that of an expert, although he, for some unexplained reason, disclaimed being such."

Now, it is true that some of the witnesses in this case, when asked the direct question whether they considered themselves as experts upon the question of Texas fever, disclaimed that they were experts, yet, when taken as a whole, their testimony shows that they had had sufficient experience with the disease and treatment of it, and had been brought in contact with it to that extent, that it was proper and right for the court to admit their testimony for what it was worth in determining whether the cattle in question had Texas fever or not. Now, in this case the plaintiff in error declined to present any testimony, expert or otherwise, on the question of whether these cattle had or had not Texas fever. The only testimony in the case was the testimony of these witnesses, and in our judgment they had qualified themselves to that extent to make their testimony admissible, and they all testified that in their opinion these cattle died of Texas fever. It seems to us that this was sufficient, in the absence of any showing to the contrary, for the court to hold that these cattle died of Texas fever. Now, this disposes of the only assignment of error relied upon by plaintiff in error in his brief.

For the reasons herein expressed, the decision of the probate court is affirmed, at the costs of the plaintiff in error.

Pancoast and Garber, JJ., absent; all the other Justices concurring.

Will McIver *et al.* v. Williamson-Halsell-Frasler Co.

WILL McIVER, *Constable*, GROVER ELLER, KEE R. MCKEE, AND F.
O. MYERS v. WILLIAMSON-HALSELL-FRASIER COMPANY.

(Filed September 20, 1907.)

(92 Pac. 170.)

1. **ATTACHMENT—Property Subject—Goods Conditionally Sold.** Where goods are sold and delivered upon condition that the title shall not pass to the vendee unless the price agreed upon be paid, the vendee has no attachable interest in the property until the performance of the condition.
2. **SALES—Rights of Seller—Purchasers—Attaching Creditors—Case.** Where articles of merchandise are sold and delivered, and the terms of the sale are that the same are to be paid for "spot cash," this means cash on the delivery of the goods, and where the same are delivered, and the vendee says to the vendor, "I will pay you as soon as I can check them up," and when the agent of the vendor went to the vendee's place of business five or six consecutive mornings after the delivery, and failed to find him in, but finally, after such repeated calls, he succeeds in finding him, and upon demand for payment is told by the vendee that he cannot pay for the goods, and for the vendor to take his goods back, and the agent of the vendor says, "all right," and immediately goes to the wholesale house of the vendor and reports the same, and on the same day comes back to the place of business of the vendee with the teams and wagons of the vendor to take away the goods, and finds the place of business of the vendee in the hands of a constable, who has made a levy upon the goods in question by virtue of a writ of attachment and refuses to give them up to the agent of the vendor, Held, that, in an action of replevin, the vendor can recover his goods as against such constable, or the attaching creditors of the vendee.

(Syllabus by the Court.)

*Error from the Probate Court of Oklahoma County; before Wm.
P. Harper, Probate Judge.*

Affirmed.

John S. Hunter, for plaintiffs in error.

Crockett & Johnson, for defendant in error.

Statement of Facts.

STATEMENT OF FACTS.

During the year 1905, Williamson-Halsell-Frasier Company, defendant in error, was engaged in the wholesale grocery business in Oklahoma City, Oklahoma Territory. Sometime between the 1st and 13th of April, 1905, the defendant in error sold and delivered to one Joseph Pickford, a retail groceryman in Oklahoma City, Oklahoma, a bill of goods, the terms of which sale were cash. These goods were delivered to Pickford in the afternoon, at his usual place of business in Oklahoma City. Invoices were delivered with the goods. The next morning, the agent of defendant in error called upon Pickford at his place of business and demanded payment for the goods. He was then told by Pickford that he would pay for the same as he could check them up and compare them with the invoices. The agent of the defendant in error called at Pickford's place of business on four or five consecutive mornings afterwards, but was not able to find him in. Finally, some days after the goods were delivered, at an early hour in the morning, about 6:30, he succeeded in finding Pickford in his place of business, and then again demanded payment for the goods, and was then told by Pickford that he could not pay for the goods, and that the defendant in error could take back their goods. The agent of the defendant in error said, "all right," and went immediately to the wholesale house of the defendant in error, and, as soon as he could secure teams and wagons, returned, on the same day, for the goods. On his return, he found the place of business of Pickford's was in the hands of Will McIver, constable, who had made a levy on the said goods by virtue of attachment in favor of Grover Eller, issued by J. J. Beall, a justice of the peace in Oklahoma City township, said levy having been made on the 25th day of April, 1905, and said constable refused to deliver the goods to the agent of the defendant in error. On the 28th day of April, 1905, Kee R. McKee and F. O. Myers, who were judgment creditors of said Pickford, caused executions to be issued on their judgments which had previously been obtained by them, and said executions were placed

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in the hands of Will McIver, who on the same day levied said execution on the said goods, subject to the attachment levy of Grover Eller. On the 4th day of May, 1905, defendant in error commenced replevin proceedings in the probate court of Oklahoma county, Oklahoma Territory, to recover the goods from Will McIver, constable, and on the 13th day of May, 1905, the plaintiffs in error moved the court to be allowed to intervene in said cause, and thereupon filed their separate answers to plaintiff's petition. On the 5th day of October, 1905, the cause was tried by a jury, and a verdict returned for the plaintiff. On the 7th day of October, 1905, defendants filed their motion for a new trial, which was overruled by the court on the 17th day of October, 1905, and judgment entered on the verdict, to which exceptions were saved, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: There are many assignments of error urged by counsel for plaintiffs in error for a reversal of this case, but we think it is only necessary to notice three, to-wit: That the court erred in rendering judgment for the defendant in error; (2) that the court erred in giving instructions offered by defendant in error; and (3) that the court erred in not numbering and marking his instructions as required by the statute.

Counsel for plaintiffs in error cite several statutes of Oklahoma, and some decisions of the supreme court of Oklahoma, as well as many decisions from other courts, to sustain their assignments of error. But we think, after an examination of these statutes and these authorities, that they are not in point, for the reason that counsel for plaintiff in error starts out in this case with the assumption that there was an absolute sale upon credit which the defendant in error is seeking to rescind on account of fraud and misrepresentations practiced by the purchaser, and the authorities cited are all in cases where a sale was made on fraudulent representations of the vendee, by reason of which the vendor,

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on discovery of the fraud, seeks to rescind the sale. Clearly this is not such a case. Here there never was a complete or executed sale, because the purchaser never complied with his part of the contract. While the authorities cited by counsel for plaintiff in error correctly state the law in the abstract, yet they are not in point here in the case at bar. The fallacy of the plaintiffs in error is based on their failure to recognize the distinction between a case where the contract never matured into a complete sale because of the failure of the vendee to perform his part of the contract, and a sale which was executed and completed by both parties, and which the vendor subsequently seeks to avoid by virtue of fraud practiced upon him by the purchaser. The distinction is obvious. In the first instance, there is no complete and executed contract of sale; in the other instance, there is a complete and executed sale, voidable on the ground of fraud. Now, we take the rule to be well established that where a sale is made, and where the terms of the sale are cash, this, among merchants, is understood to mean cash on the delivery of the goods; that in the commercial world there is no difference and no distinction between a cash sale, or what is known as "spot cash sale," and a sale for cash on delivery. All of the evidence in this case shows, and in fact the proposition is undisputed, that this is what is known in commercial parlance as a "spot cash sale;" that is, that by the terms of the sale the vendee was to pay cash for the goods upon the delivery of the same. In such a sale, the title does not pass until the goods are paid for, and a party who delivers goods under and by virtue of such a contract for sale has the right to replevin his goods on failure of the vendee to pay the purchase price. In other words, the title to the goods does not pass until the condition of payment has been complied with.

The supreme court of Kansas, in the case of *Dougherty v. Fowler*, reported in 25 Pac. 40, had a similar question under consideration. That case was an action in replevin commenced by the plaintiff below in the district court of Bourbon county, to recover

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fifty tubs of butterine from the sheriff, who held the same by an order of attachment issued against the property of T. W. Price and D. B. Fabyan, who had been doing business in Ft. Scott, under the name of T. W. Price & Co., but had sold out their business some time before the attachment was issued. On the 24th of November, 1885, T. W. Price went to Kansas City, Missouri, and made an arrangement with the plaintiff below whereby he was to have shipped to him, at Ft. Scott, 50 tubs of butterine, payable cash on arrival. The butterine was not made at the time. It was to be procured from other parties, and there was no selection made except by sample. The butterine was shipped on Friday, the 27th of November, and reached Ft. Scott the following morning, and was immediately received by Price, and the freight paid, and stored in the cellar. The goods were invoiced in the usual way, followed by detailed weight of each separate tub, and written on the bill were the words: "Terms cash." On Monday, the 30th of November, Price caused the butterine to be moved into a different part of the cellar from where it had been previously stored, and removed all the shipping tags, and on Tuesday morning, December 1st, wrote the plaintiff that he was unable to pay for the butterine; that the goods belonged to the plaintiff; and he had placed them in the possession of a reliable party, who would take care of them until he could hear from the plaintiff. It appears from the testimony that this letter reached the plaintiff below at 8:30 o'clock on Wednesday morning, December 2nd, who concluded to accept the proposition contained in the letter, and to take back the shipment of butterine. It was in evidence that Price had owed the plaintiff below \$10.70 upon some other dealings, and had paid out for freight on the merchandise \$8.05. At noon of the same day the butterine was attached by one of the creditors of T. W. Price & Co. A trial was had in the district court, and, upon the conclusion of the evidence, the court instructed the jury to return a verdict for the plaintiff. It is insisted that in that case the letter written by Price on the 1st day of December was

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not competent evidence, as not having been properly authenticated. Then the court said:

"It is further insisted that 'mental conclusion' reached to take the goods back was not competent; that the only way to prove that the goods were taken back was what was in fact done. The acceptance of Price's offer was an affirmative act, and not a mere mental conclusion, as assumed by the court below. This we regard as the decisive question in this case. Let us consider it. The facts are virtually undisputed. The goods were shipped to be paid for on arrival. They were received by Price, and the freight paid, and stored by him. Before the rights of any other parties intervened, the vendee said to the vendor: 'I cannot pay you for the goods, and I have placed them in the hands of a party who will take care of them until he hears from you. The goods are yours. I have done what I thought best.' Does this proposition, made by the vendee and received by the vendor, require affirmation upon the part of the vendor to make the transaction complete? An answer to this question is a decision of this case. If this proposition stood alone and in no way connected with what had preceded it, it would be less difficult of solution. We would say that an acceptance was necessary upon the part of the plaintiff in error to make the offer binding and the transaction complete. But we must consider the whole transaction, from its inception to the transmittal of the letter, and say whether the title to the property in question ever passed to Price. The terms of the sale were 'cash on arrival,' or 'cash,' as expressed in the invoice. Now, the rule is that if goods be delivered before the price is paid, in compliance with the usage of trade, the delivery is conditional and until the condition is performed the vendee holds the goods in trust for the vendor, against all persons except *bona fide* purchasers without notice. Story, Sales, §213; *Hussey v. Thornton*, 4 Mass. 405; *Marston v. Baldwin*, 17 Mass. 606; *Corlies v. Gardner*, 2 Hall (N. Y.) 374; *Reeves v. Harris*, 1 Bailey (S. C.) 563. It seems from the evidence in the case that there were two concurrent conditions to make the sale complete: Delivery upon the part of the vendor, and payment upon the part of the vendee. This frequently occurs where goods are shipped by common carriers, as in this case to be paid for on arrival; and the failure to make payment will be regarded as a nonperformance of the condition precedent, upon the part of the vendee, and will entitle the

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vendor to reclaim his goods. Newm. Sales, § 227. In *Stone v. Perry*, 60 Me. 48, it appeared that the plaintiffs were merchants in Boston, and a broker called and inquired the price of flour, and plaintiff asked whom it was for, and the broker replied: 'Butler, of Portland.' Plaintiff answered that he did not know him, but that he would sell the flour at \$8.75 for cash. The broker went away, and soon returned, and said he would take the flour, which was shipped, and the next day a bill was forwarded to Butler and Co. with the words, 'Terms cash,' printed on the margin. On the following Monday one of the plaintiffs went to Portland, and upon ascertaining that Butler & Co. had failed, and that the flour had been attached, replevined it from the officer. In that case the court said: 'If goods are sold conditionally, and delivery made, according to the custom of the trade, before the conditions are complied with in expectation of compliance, the delivery is also conditional, and no title vests in the purchaser until the performance of the condition; and, if he steadily refuses compliance, the seller may recover the goods by action of replevin.' *Bauendahl v. Horr*, 7 Blatchf. (U. S.) 548. In *Russell v. Minor*, 22 Wend. (N. Y.) 659, the court said: 'Where, under a contract for the sale of chattels, a delivery of a portion of the property sold was made to the purchaser under an agreement that a note should be given for the whole quantity upon the delivery of the residue at a future day, the delivery of the first part was held to be conditional, and that, on the delivery of the residue, and the refusal of the purchaser to give the note, and to deliver up the first parcel on demand, an action of replevin for the wrongful detention might be sustained. Where goods are sold to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods; and if, during the delivery and before it is completed, the purchaser sells or pledges them to a third person for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser.' In *Palmer v. Hand*, 13 Johns (N. Y.) 434, the court stated: 'When goods are sold to be delivered by the vendor without any stipulation for credit, it is his right to demand payment immediately upon their delivery, and, payment being refused, he may reclaim the goods. Ordinarily this right to reclaim should be exercised promptly

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after refusal of payment.' In *Morris v. Rexford*, 18 N. Y. 552, it was said: 'I consider it a proposition plain in principle and sanctioned by authority that a vendor may reclaim his goods after delivery upon a sale for immediate payment, if the vendee, on getting the property in his possession, refuses to make the payment. If there be no term of credit expressed or implied in the dealing, the delivery in such cases is deemed to be conditional, and subject to revocation on the refusal or failure of the purchaser to pay the price.' Mr. Justice Strong, in the *Elgee Cotton Cases*, 89 U. S. 180, quotes approvingly the rule from Benjamin on Sales, which he regards as well settled law in England, and also this country: 'Where the buyer is, by contract, bound to do anything as a condition, whether precedent or concurrent, on which the passing of the property depends, the property will not pass until the conditions be fulfilled, even though the goods may be actually delivered into the possession of the buyer.' Benj. Sales (Corb. Ed.) 359, 397, and authorities there cited. The doctrine of this rule seems to be almost universally sustained by the American courts. We reach the conclusion in this case that, by the terms of the contract, there was a concurrent condition of payment upon the part of the buyer, to be performed before title passed to him. The buyer having notified the plaintiff below that he was unable to pay, he was entitled to the possession of the property, and there was no necessity of his making any reply to the buyer's letter in regard to his inability to pay, so that he exercised the right to reclaim the goods within a reasonable time, which it seems from the evidence he did. It follows from this view of the law that there was no error upon the part of the court below in instructing the jury to find a verdict for the plaintiff."

An examination of this record, and the evidence therein contained, will show a striking similarity between the case at bar and the case under consideration by the Kansas supreme court. The evidence shows that these goods were bought from the defendant in error on the express terms that they were to be spot cash—that is, cash upon the delivery of the goods; that the goods were delivered to the vendee at his usual place of business in the evening. On the following morning, the agent of the vendor went to the vendee and demanded payment. The agent was then in-

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formed by the vendee that he would make payment as soon as he could check up the goods and ascertain if they corresponded with the invoice. On the next morning, the agent again went to the place of business of the vendee, but was unable to find him in. The evidence shows that for five or six mornings in succession he went to the usual place of business of the vendee, but failed to find him. Something like eight or ten days afterwards, he went to the vendee's place of business at an unusual early hour in the morning, and found him there, and then again demanded payment, was then told by the vendee that he could not make payment for the goods, and that the vendor could take the goods back, which proposition was then and there accepted by the agent of the vendor, and immediately he went to the wholesale house of the vendor for teams and wagons to take away the goods, and on the same day he returned with teams and wagons for the purpose of taking away the goods, and found them in the hands of the constable, who had levied on them by virtue of the attachment in this case, and the executions mentioned in the record. Now, the only difference between this and the Kansas case is that in that case there was no express acceptance of the proposition of the vendee to return the goods on account of inability to pay, while in this case there was an express acceptance. In the Kansas case the vendee wrote that he could not pay for the goods, and that they were the property of the vendor, and that he would put them in the hands of a third party. In the case at bar, the vendee told the agent of the vendor that he could not pay for the goods, and that he would turn them over, which proposition was accepted by the agent of the vendor, and, in that particular, we think, makes a stronger case than the Kansas case.

This same identical question was before the supreme court of Utah in the case of *Paulson v. Lyon*, reported in 73 Pac. 510. In that case the facts were that on September 10, 1901, at Salt Lake City, Utah, defendant, who was a jeweler, entered into a contract with plaintiff, who was a show-case maker, for the pur-

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chase of certain articles to be used in defendant's jewelry store. The contract, so far as material here, was as follows: "This is to certify that I, the undersigned, have this day purchased from J. P. Paulson, of Salt Lake City, Utah, the following described articles: (Then follows an enumeration of the goods which are described as plate glass wall cases, counters with plate glass show cases, etc.) All of the above described articles to be made of the very best mahogany. In consideration of the above, I promise to pay J. P. Paulson, or order, the sum of nine hundred (\$900.00) dollars upon delivery of these goods." The articles mentioned in the contract were furnished by the plaintiff, and placed in the defendant's store, and were ready for use November 26, 1901, at which time the defendant opened his store and commenced using them. Immediately after the goods were put in and ready for use, the plaintiff demanded payment for the same, and for about a month made repeated demands of defendant for payment of the purchase price, but defendant, on one pretext and another, put him off until December 28, 1901, without paying the amount due or any part thereof, excepting \$37.50, which was paid on or about December 24, 1901. On December 28, 1901, plaintiff commenced an action to recover possession of the goods. The case was tried by the court without a jury, and after hearing the evidence, which showed the foregoing facts, the court found all the issues in favor of the defendant, and ordered judgment in his favor, and dismissed the plaintiff's complaint. The first and third findings are as follows: "(1) That the defendant now is, and ever since about the 25th day of November, 1901, has been, the owner and in possession, and entitled to the possession, of all the goods and chattels described in the plaintiff's complaint. (3) That the defendant did not at any time withhold or detain any of said goods or chattels from plaintiff's possession to plaintiff's damage in any sum whatever." From this decision, the plaintiff appealed. The court says:

"The contract under consideration expressly provides that

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the goods shall be paid for on delivery. The well-established rule is that where goods are sold, to be paid for on delivery, as was done in this case, the payment is a condition precedent to passing title, unless such payment is waived at the time, or subsequent to the delivery of the goods. 6 Ency. Law. (2d. Ed.) 456; 1 Mechem on Sales, 538; *Dudley v. Sawyer*, 41 N. H. 326; *Leven v. Smith*, 1 Denio (N. Y.) 571; *Hammett v. Linneman*, 48 N. Y. 399; *Dougherty v. Fowler* (Kan.) 25 Pac. 40, 10 L. R. A. 314 "To constitute a waiver there must not only be a delivery, but an intent not to insist upon immediate payment as a condition of the title passing." *Globe Milling Co. v. Minneapolis Eleve. Co.* 44 Minn. 156, 46 N. W. 306; Mechem on Sales, 552. The important question in this case is: Does the record show such intent, or a state of facts from which the intent could be reasonably inferred? The record shows that, immediately after the goods were put in respondent's store and were ready for use, appellant demanded payment, and for nearly a month thereafter made repeated demands upon the respondent for the purchase price, and without any unreasonable delay commenced an action to recover the property. We have made a careful examination of the record, and fail to find any evidence whatever that tends to support the contention that Paulson said or did anything from which it can be inferred that he intended to relinquish his title to the property before it was paid for in full, or that Lyon understood that the title had passed to him. In fact, Lyon himself testified that he only accepted the goods temporarily, and nowhere in the record does it appear that either Paulson or Lyon treated or regarded the same as absolute and unconditional. This being an action at law, if there were any evidence whatever to support the foregoing findings, we would not disturb the judgment; but as the evidence is all one way, and shows that Paulson never waived payment, or relinquished his title to the goods, the case must be reversed."

Now, what is true in the Utah case is forcibly true in the case at bar. All the evidence in the case, in fact, the undisputed evidence in the case, is that this was a sale for spot cash, and the entire conduct and language of the defendant in error throughout this entire transaction negatives the proposition that he ever waived or intended to waive his right to demand cash payment as a condition precedent to the passing of title. We find: That

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immediately on delivering the goods he demanded payment; that he went there on every morning for five or six consecutive mornings for the purpose of demanding payment; and that as soon as it was possible to secure an interview with the vendee he did demand payment, and then is informed that the vendee is unable to pay for the goods, and that he must take his goods back, which he then agreed to do. Now, there is no positive evidence in this record which shows whether or not, at the time of this agreement, the rights of any creditor had intervened. There is no evidence tending to show that this writ of attachment had been made by the officer at the time the vendee informed the vendor that he must take back his goods. But we think we have a right to presume that there had not, from the fact that no one testified that at the time of this conversation between the vendee and the agent of the vendor, wherein it was agreed that the vendor should take the goods back, that there was any writ of attachment, or that anybody else other than the vendee was in possession of the goods, but the evidence does show that, on the same day when the agent of the vendor returned with teams and wagons of the vendor to take possession of the goods under the terms of the agreement, he then found, for the first time, that the same was in the possession of the officer. Hence we think it a fair presumption of fact that the levy by the officer under the attachment shown by the record was between the time in the morning at 6:30, when the vendee and vendor had the conversation by which the vendee told the vendor that he was unable to pay, and the time in the afternoon, when the evidence shows the agent of the vendor went there to take possession of his goods. So we think it a fair presumption from the evidence in the case that at the time the agent of the vendor demanded payment of the vendee, and was informed by the vendee that he could not pay, and that the vendor must take his goods back, no levy had been made, and the rights of no third person had intervened.

We take it that the intervenors here, the attachment and ex-
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ecution creditors, are in no better position, and have no greater rights than had the vendee, because our own supreme court, in the case of *Central Loan and Trust Company v. Campbell Commission Company*, reported in 5 Okla. 411 (bottom of the page), 49 Pac. 52 lay down this rule: "Where property is sold and delivered upon conditions that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until the performance of the condition." Drake on Attachment, § 246; *Buskmaster v. Smith*, 22 Vt. 203; *McFarland v. Farmer*, 42 N. H. 386, 19 Fed. Rep. 760; *Lucas v. Birdsey*, 41 Conn. 357.

Now under the law as laid down in this decision, and all of the decisions upon the subject that we are able to find, we think that the conclusion of the jury and the finding of the court that the plaintiff was entitled to recover his goods was correct, and, as the instructions of the court correctly state the law as laid down in this opinion, we think the instructions were eminently proper, and correctly stated the law.

The only remaining assignment of error is that the court erred in not numbering and marking its instructions, as required by the statute; but in making this contention we think that counsel for plaintiff in error has entirely overlooked the express provision of our statute. Wilson's Revised and Annotated Statutes of Oklahoma, volume 2, section 4462, page 1031, provides: "When the evidence is concluded, and either party desires special instructions to be given to the jury, said instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury which shall be in writing and numbered and signed by the judge if required by either party." Now, in this case the record does not disclose that any requirements or request was made by defendants or either of them for numbering of the instructions. The instructions were in writing, which is the essential thing. The

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failure to number the instructions; there being no request, is not error, and at best, if error, would be harmless, and would be no ground for reversing the case, the instructions being otherwise correct.

Having examined the entire record, and finding no error therein, and believing that substantial justice has been done, the decision of the probate court is affirmed, at the costs of the plaintiffs in error.

Garber and Pancoast, JJ., absent; all the other Justices concurring.

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(Filed September 20, 1907.)

(92 Pac. 167.)

MECHANICS' LIEN—Property Subject—Leasehold Estates. Under the statutes of this territory a mechanic's lien will attach in any proper case to a leasehold estate; and the fact that the tenant may have the right to remove his building, fixtures and machinery from the leased premises, instead of lessening the lien, or preventing it from attaching to the leasehold estate, will, as we think, enlarge the lien, and enable the lienholder to obtain a greater interest in the leased premises. Neither will the fact that for some purposes, and under some circumstances, the buildings, fixtures and machinery put upon the leased premises by the tenant may be considered as personal property, have the effect of preventing the lien from attaching.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

Hudson & Keys, for plaintiffs in error.

Stevens & Myers, for defendant in error.

STATEMENT OF THE CASE.

Plaintiff filed his petition in the district court of Comanche county, seeking a foreclosure of mechanic's lien for \$342.00, claimed to be due for labor and material furnished under sub-

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contract for the construction of a frame dwelling on certain lots in Butler's addition to the city of Lawton, owned by C. W. Jarrell, and which are more particularly described in the lien and in the petition. A personal judgment was prayed against L. H. Robinson, the contractor, but he was not served with summons, the return being "not found." The defendant, O. P. M. Butler, made no appearance, though personally served. Defendants C. W. Jarrell and wife filed their answer in which it was admitted that L. H. Robinson built a house upon the tract of land mentioned, but C. W. Jarrell and wife deny that C. W. Jarrell was then owner of said lot, but that he was only a sublessee of said lot of ground; that on the — day of November, 1902, said defendant subleased said tract from O. P. M. Butler, he being the original lessee from the school land board of the territory of Oklahoma; that he was in possession of said premises as sublessee, the title to the same being in the United States or the territory of Oklahoma; that either the United States or the territory is the owner thereof; and that no contract was entered into between the plaintiff and the agent or trustees of either said territory or the United States. These answering defendants admit the service of lien, but they say that the name of the owner was not properly stated therein, and, among other things, allege payment of a portion of the account, and also allege that the contract has never been completed nor accepted by them. The plaintiff filed reply, alleging that under the act of congress approved May 4, 1894, the board for leasing school, public building, and college lands of Oklahoma Territory, on the 15th day of May, 1902, being fully authorized to so do, entered into a contract with O. P. M. Butler, allowing the subleasing of said lands in controversy, with other lands, for townsite purposes, and attaches a copy of the contract between said O. P. M. Butler and said board. Upon the issues thus framed, the cause, by agreement of parties, was referred to Hon. O. H. Travers, who in due time qualified. The time for making report was extended at various times, and the

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respective parties waived any irregularities there might have been in these orders by appearing before the referee, and after his report recognizing the same in various ways; each desiring the cause submitted on its merits. A trial was had before the referee, and all the proceedings before him are incorporated in the record at page 28 to 128. The report of the referee was duly made and filed, and is found in the record pages 28 to 38, in which judgment for plaintiff is recommended. Motion was duly made to confirm the report of the referee, by the plaintiff, and the defendants filed their motion to set aside the report of the referee and grant a new trial. The motion of the defendant to set aside the report of the referee and grant a new trial was overruled, and the motion of the plaintiff to confirm the report of the referee was sustained. To all of which the defendant excepted and excepts, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: It is conceded by counsel for plaintiff in error that there are no disputed questions of fact in this case, and that the issues are entirely questions of law. The issues of law are stated as: First, a mechanic's lien does not affect school land, the title to which is in the government of the United States; second, the residence in question is personal property by the terms of the lease, and a mechanic's lien does not attach to personal property independent of the real property; third, that the trial court did not have jurisdiction of the subject-matter of the action. It will be observed that the foregoing legal proposition embraces all of the assignments of error, and it is conceded by counsel for plaintiff in error that a discussion of one of the assignments of error would be a discussion of all.

The first proposition to be considered is: This land being school land, and the tenant in possession being a subtenant under the lessee from the school land board, and the title to the land being in the government of the United States—that is, the fee

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being in the government of the United States—is the person in possession the owner to that extent that mechanic's lien proceedings could be prosecuted against whatever interests he may have in the land? By the act of May 4, 1894, the congress of the United States granted to the territory the right to lease the school, public building, and college lands of Oklahoma Territory, under such regulations and laws as the legislature may prescribe, and until such time as the legislature might act, rules and regulations of the secretary of the interior theretofore prescribed should govern, except that leases should not require his approval. That the only action taken by the legislature was the adoption of council joint resolution No. 16, in the year 1895, which authorized the board to continue the leasing of lands in the event that the legislature failed to act, and by virtue of the act of congress and the joint resolution, the board for leasing school and other lands was authorized to lease the school lands within the territory, and that the tract in controversy was a part of lands reserved for school purposes. The record further shows that the said board in fact made a lease to O. P. M. Butler, which in terms allowed him to sublease for townsite purposes, the lease and contract to Butler being found on page 17 of the record, and the sublease from Butler to Jarrell on page 93 of the record. As a conclusion of law, the referee found that a person holding even a leasehold estate was, for the purpose of the mechanic's lien law, the "owner" of the premises, and that the lien attached to his interest in the estate, whatever that might be, and to the buildings erected. We think this was a correct statement of the law.

It is urged by plaintiff in error in his brief that the title to the land, and we presume he means by this the fee to the land, was in the government of the United States. That proposition, it seems to us, makes no difference with the case. It makes no difference whether the fee to the land was in the territory, or the United States. Congress had the right, undoubtedly, to create any estate in said lands it saw fit, if the title was still in the

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government. It had deemed it expedient to authorize the leasing of these lands under the policy inaugurated by the honorable secretary of the interior years since, giving, however, to the territory the right to legislate further thereon. The territory had spoken through its legislature and said that the leasing of the lands should be left to the board, which was in control of them in 1895, and in that board the power to lease has been vested. The power of that board to create leasehold rights cannot be doubted. It has been given by the government and confirmed by the territorial legislature. Conceding that the lease does not convey any portion of the fee of the land, it must be seen that a lease executed by the government, or by its authority, is at least of equal dignity with a lease from an individual who owns the fee. Our mechanic's lien law in force at the time of the filing of the lease in controversy was that adopted from the state of Kansas, and, in so far as it affects the questions involved herein, is as follows:

"Sec. 619. Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, furnish material for the erection, alteration or repair of any building, improvement, or structure thereon. or who shall furnish or perform labor in putting up of any fixture, or machinery in or attachment to any such building, structure or improvement; or who shall plant any trees, vines, plants, or hedges in or upon said land; or who shall build, alter or repair or furnish labor or for building, altering or repairing any fence or foot walk in or upon said land or any sidewalk in any street abutting said land shall have a lien upon the whole of said piece or tract of land, the building and appurtenances in the manner herein provided for the amount due him for such labor, material, fixtures or machinery."

The supreme court of the state of Kansas has, in our judgment, sufficiently answered the contention of plaintiff in error as to the construction to be put on this mechanic's lien law, long prior to its adoption by the legislature of this territory, and they have also answered the second contention, to-wit, that, as the

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buildings on this land were personal property, the mechanic's lien law would not attach to them. Under a well-settled and oft-repeated rule of this court, the construction given a statute by the state from whence it was taken, prior to its adoption here, is adopted with the statute, and in effect forms a part of it. This identical statute was construed by the Kansas court prior to its adoption in Oklahoma, and the word "owner" therein was held to embody any interest in lands, no matter how slight. In the case of *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. 29, the Kansas supreme court say: "About the only ground upon which it is claimed that it is not correct is the claim that a leasehold interest in real estate is not the subject of a mechanic's lien, or a lien for material or labor furnished in making improvements upon real estate; and it is claimed that this is especially true in the present case, where the tenant has the privilege of removing all the improvements placed upon the leased premises. The statute with reference to this subject provides, among other things, as follows: 'Any mechanic, or other person, who shall under contract with the owner of any tract or piece of land, * * *'" In the same opinion, the court further says: "The word 'owner' in the first section of the act is not limited in its meaning to an owner of the fee, but includes, also, an owner of leasehold estate. If the ownership is in fee, the lien is upon the fee; if it is of a less estate, the lien is upon such smaller estate. To hold that an owner in fee only is meant would be directly subversive of the policy of the act, and in a great degree render it useless. We think a mechanic's lien or lien for material or labor may attach in any proper case to a leasehold estate; and the fact that the tenant may have a right to remove his buildings, fixtures, and machinery from the leased premises, instead of lessening the lien, or preventing it from attaching to the leasehold estate, will, as we think, enlarge the lien and enable the lienholder to obtain a greater interest in the leased premises * * *." "Neither do we think that the fact that for some purposes, and under some circumstances, the build-

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ings, fixtures, and machinery put upon the leased premises by the tenant may be considered as personal property, have the effect of preventing the lien from attaching. For the purpose of the lien in such a case, the leasehold interest will include the right to the buildings, fixtures, and machinery, and the right to remove them; and the whole of such leasehold interest, with the buildings, fixtures, and machinery, will be considered as an interest in the real estate, and, under the circumstances, the lien will attach to all. The statute giving liens for materials and labor expressly and specifically mentions buildings, fixtures, and machinery, and it was intended by the statute that such lien should attach to the buildings, fixtures, and machinery, as well as to the whole of the estate owned by the party contracting for them." *Block v. Pearson et al.* (Reported in this volume) 91 Pac. 714.

But it is claimed that the action of the territorial officials on making the lease in question amounted to an interference with the primary disposal of the soil. We are unable to see what objection there can be, since congress, later than the organic act referred to, permitted the action, and the organic act, if in conflict with the later expression of congress, must yield to it. It is apparent from this record that the plaintiff did not seek, the referee did not recommend, and the court did not give him any lien upon the property of the United States, or of the territory, but expressly asked that the interest of the defendant be taken, and the referee so recommended, and the decree of the court followed the recommendation. If congress at any time should withdraw its consent by a repeal or amendment of the law, and the defendant's interest was thereby lessened, the interest passed by the decree would likewise be affected, in other words, nothing but the exact interest of the defendant, be that great or small, was affected, and if the interest which the United States and the territory expressly agreed should pass to the defendant was taken, and no more, we fail to see how it can be urged that the rights of either the territory or the United States were encroached upon.

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The only remaining assignment of error is that the court did not have jurisdiction of the subject-matter of the controversy. This assignment of error is insisted upon, upon the theory that as the title to the land in question was in the government of the United States, and that in determining this case the character of the land had to be determined, the court did not have jurisdiction to hear and determine that question. But this contention has been fully answered by the supreme court of this territory in the case of *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1082, in an opinion written by Justice Burwell, in which it is said: "Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases; power to hear and determine a cause. If the court has jurisdiction of the persons to the action, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action, and has the power to render any rightful judgment therein." But when we consider this case, and bear in mind the fact that no interest of the United States in the land in question is sought to be taken, and that the only effect of the report of the referee and the decree of the district court is to subject to the lien such interest as the defendant in the court below had in the land, the reason for the contention in the assignment of error that this court has no jurisdiction fails.

Having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, at the costs of the plaintiff in error.

Gillette, J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

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RANDALL COMPANY, *a Corporation*, v. JOHN GLENDENNING *et al.*

(Filed September 20, 1907.)

(92 Pac. 158.)

1. **BILLS AND NOTES—Non-negotiable Notes—Bona Fide Purchaser—Defenses.** A non-negotiable note, transferred to an innocent purchaser before maturity and for a valuable consideration, without notice, either actual or constructive, to the maker thereof, is subject to all the legal defenses which might be interposed against the note in the hands of the original payee.
2. **MORTGAGES—Assignment —Execution—Record—Notice.** Notice recording of an assignment, by a corporation, of a mortgage, without the attesting of the secretary of said corporation, as required by running section 921, page 331, Willson's Revised Statutes of Oklahoma 1903, is not constructive notice.

(Syllabus by the Court.)

Error from the District Court of Noble County; before Bayard T. Hainer, Trial Judge.

Affirmed.

W. F. Wilson and H. E. Elder, for plaintiff in error.

W. M. Bowles, for defendants in error.

STATEMENT OF FACTS.

This action is brought by the above-named plaintiff in error upon a promissory note, in writing, made, executed, and delivered by the said defendants in error, John Glendenning and Cora Glendenning, his wife, on July 24, 1900, by the terms of which the said John Glendenning and wife agreed to pay the Bunnell & Eno Investment Co., a corporation, or order, the sum of five hundred dollars on the 1st day of August, 1907, with interest at five and one-half per cent. per annum, payable semi-annually, on the first day of each and every August and February after the date of said note, as evidenced by coupon interest notes for \$13.80 each, attached to the principal note, numbered one to fourteen, inclusive, and by the terms of which said principal note the said defendants

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in error agreed to pay, in event said notes be placed in the hands of an attorney for collection, the sum of ten per cent. additional attorney's fees, and also in event there should be default in the payment of principal or interest, as the same became due, according to the terms and tenor of said note, then the whole sum thereby evidenced should become immediately due at the option of the legal holder of said note and should bear interest from the date of such default at the rate of ten per cent. per annum, until paid, which note was secured by a real estate mortgage of even date herewith, executed in due form by the said defendants in error, upon the following described real estate and premises located in Noble county, Oklahoma Territory, to-wit: The northwest quarter of section eleven (11), in township twenty-two (22) north, of range two (2) west of the Indian Meridian, which said mortgage was, on the 24th day of July, 1900, recorded in book 6 of mortgages, at page 34, of the records of said Noble county, territory of Oklahoma.

The plaintiff in error, the Randall Company, a corporation. pleading title to said notes and mortgages, by reason of the endorsement of said notes by the Bunnell & Eno Investment Company, and by reason of the written assignment of said mortgage duly executed by the Bunnell & Eno Investment Company on the 31st day of August, 1900, which said assignment of said mortgage was thereafter on the 14th day of March, 1902, filed for record in the office of said register of deeds of said Noble county, Oklahoma, and recorded in book 1 of Assignments, page 11, and declaring a default in the terms of said note because of the fact that interest coupon, due August 1, 1902, for \$13.80, with all other interest coupon notes then due, were not paid, and asking for judgment against the defendants on account of said principal note and interest coupon note due August 2, 1902, and for an attorney's fee of 10 per cent. additional, for costs of suit, and for a decree of foreclosure of said real estate mortgage upon the premises aforesaid.

The defendants thereafter, and within due time, filed their

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answer to the petition of the plaintiff, alleging that on January 16, 1902, they had paid off said principal note and coupon notes at the office of the Bunnell & Eno Investment Company, and denying that the plaintiff in error was the owner, at said date, in good faith, for value, of the notes and mortgage in controversy, and also denying that the assignment of said mortgage was a valid assignment by the said Bunnell & Eno Investment Company, for the reason that the same was not attested by the secretary of said corporation, under the corporate seal, and further alleging that the Bunnell & Eno Investment Company, at the said date, to-wit, the date upon which said defendants in error paid off and discharged said principal and coupon notes, was the agent of the holder of said notes, the plaintiff in error here, and as such received the money in payment thereof, and praying the court that the plaintiff in error take nothing by its action on said notes and mortgages, and praying affirmatively that said notes and mortgage be by the court set aside, canceled, and held for naught.

To this answer the said plaintiff in error filed its reply in due time in said court, alleging that the said Bunnell & Eno Investment Company never was its agent for the collection and receipt of the moneys in payment of said note from the defendants in error, and further alleging that it was, on and before the date of the payment made by the said defendants in error to the Bunnell & Eno Investment Company, the purchaser of said notes and mortgage for value received, and in the due and regular course of business, and further alleges that contemporaneous with the execution of the note and mortgage by the said defendants, which is sued on in this action, the said defendants did make, execute, acknowledge, and deliver a certain written instrument, by the terms of which they did appoint and nominate one H. D. Price, of Oklahoma City, Oklahoma, who was then and there the territorial agent of the said Bunnell & Eno Investment Company, their true and lawful attorney in fact, for them and in their stead to negotiate said loan evidenced by the notes and mortgage sued on herein.

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and further empowered their said attorney in fact, the said H. D. Price, to look after the said loan, insurance, taxes, remittance of interest and principal to the person, persons, or corporations from whom they procured money and all payments made to said corporation or their successors in business to be, at the risk of the said defendants, and in all dealings with said loan said Bunnell & Eno Investment Company, or their successors, to be the agents of the said defendants, which said instrument in writing is attached to said reply as an exhibit, and will be found on page 27 of the case-made, and further alleging that this plaintiff in error did, pursuant to said power of attorney and contract of agency, purchase said notes and mortgage for value, prior to the date of their maturity, and that the said defendants had paid, through H. D. Price, at Oklahoma City, Oklahoma, their attorney for the transmission to the Bunnell & Eno Investment Company of the moneys in payment of said notes and mortgage aforesaid, long after the transfer of said notes to this plaintiff in error for value, and that the payment thereof was made by reason of said contract or agency in writing at the risk of the defendants in error.

The defendants in error then filed their motion for judgment on the pleadings, which motion was, by the consideration of the court on May 25, 1905, sustained, and accordingly judgment was entered against this plaintiff in error for costs, and, further, the court ordered, upon said answer of the defendants, that the mortgage sued on herein be set aside, annulled, and canceled, to review which ruling of the court on said motion for judgment the plaintiff in error duly perfected this appeal.

Opinion of the court by

IRWIN, J.: The contention of plaintiff in error is that the action of the court in sustaining the motion for judgment on the pleadings in favor of the defendant was error for the reason the pleadings show that the note in question was transferred by the original payee, Bunnell & Eno Investment Company, to plaintiff

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iff in error prior to the payment, and that at the time said payment was made by the defendant the Bunnell & Eno Investment Company were not the owners of the note, and had no right to collect the money due thereon. But we take the rule of law to be that where a non-negotiable note is transferred to another, although that party is an innocent purchaser, and the transfer is made before maturity and for a valuable consideration, yet, if made without notice, either actual or constructive, to the makers thereof, it is subject to all the legal defenses which might be interposed against the note in the hands of the original payee. Now, if this note is a non-negotiable note, and under the facts as shown by the pleadings in the case, the original payee, Bunnell & Eno Investment Company, could not recover thereon, then the plaintiff in error could not recover, unless the pleadings show that the defendants had either actual or constructive notice of the assignment by Bunnell & Eno Investment Company to plaintiff in error.

That this note is a non-negotiable note is conceded by counsel for plaintiff in error in their brief, on page 6, at the bottom of the page, at the very outset of their argument, in which they confess that this court has decided that a note in terms similar to the one in suit here is a non-negotiable note, and they concede that this is conclusive in this case, and consequently that this is a non-negotiable note under the laws as interpreted by the supreme court of this territory. Now, this being conceded, then the other proposition that, unless it can be shown that the defendants in the court below had actual or constructive notice of the transfer of the note from the Bunnell & Eno Investment Company to plaintiff in error, a payment by the defendant in error to the original holder of the note would be a complete defense to an action on the note. This court in the case of *Dickerson v. Higgins et al.*, 15 Okla. 588, 82 Pac. 649, in the syllabus, uses this language:

“Where the makers of a non-negotiable note and interest coupons have neither actual nor constructive notice of the assignment of the note and coupons, or of the mortgage securing the

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same, proof of the payment of the note and coupons to the payee in accordance with the terms and tenor of the note and mortgage is a complete defense to an action upon the same."

Now, the pleadings in this case concede that the payment in full of this note, both principal and interest, was made by the defendants to the Bunnell & Eno Investment Company the original payees in the note. The pleadings further disclose that the only assignment of this note and mortgage which was ever recorded was one which was not attested by the secretary of said corporation as required by running section 921, page 331 of Wilson's Statutes of the territory of Oklahoma, 1903. That section of the statute provides:

"Every deed or other instrument affecting real estate, executed by a corporation, except when executed by an attorney in fact, must be attested by the secretary or clerk of such corporation with the corporate seal attached."

The pleadings in this case disclose that this section of the statute was not complied with, or any attempt made to comply with it. Now, we think the rule is that, where the statute points out the manner in which an instrument filed for record must be attested in order to be of any avail as notice to the parties interested and the public generally, it must be attested in the manner required by statute. This court, in the case of *Richardson v. Shelby*, 3 Okla. 68, 41 Pac. 378, in the syllabus, on page 70, say:

"In order to have the effect of notice to creditors, a chattel mortgage, or copy of it, must be such as is by the statute declared to be sufficient and effective for that purpose, and the registry must have been made in compliance with the law, otherwise the registry will be treated as a mere nullity."

Constructive notice from the record being dependent upon purely statutory provisions, it naturally follows that effect will not be given to any and every recorded instrument, but only to such as fall within the statute. If an instrument be not of a kind authorized by law to be recorded or not, though within the contemplation of the statute it be not entitled to record because of its defective

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execution or failure to comply with some of the prerequisites to entitle it to be made a matter of record, it will be treated as a nullity, and will not operate to give constructive notice. In 24 American & English Ency. of Law (2 Ed.) page 100, this doctrine is enunciated: "In order that the effects of registration may attach to an instrument, it must be a valid instrument; the record of a void instrument is of no effect. Where signing and sealing are necessary to the validity of a deed, mortgage, or other instrument, such instrument is not entitled to record unless it be properly signed and sealed." Under our statute, the only persons authorized to execute an instrument affecting real estate made by a corporation must be an attorney in fact of said corporation, or by the president or vice president of said corporation, and their signature must be attested by the secretary or clerk with the seal attached; so the signature of two officers of a corporation must be signed to every instrument affecting real estate, otherwise, the same is void, and a void instrument, under the authorities, is not eligible of record.

Another very strong reason why this assignment and the recording of it should not, in equity, be allowed to effect the rights of the defendants is that the pleadings disclose that the payments made by the defendants were made in January, 1902, and this assignment of the mortgage by Bunnell & Eno Investment Company to plaintiff in error was not made a matter of record until March 14, 1902, about two months after the payments were made. So, under the admission of the pleadings, the payments of the principle and interest of this note was made by the defendants to the Bunnell & Eno Investment Company, the original payees of the note, without any actual or constructive notice, as the recording of this assignment, which was not made a matter of record until two months after the payment was made, could not be held to be constructive notice, and there is nowhere any claim in the pleadings made that actual notice of the assignment was ever given to the defendants. Hence we think the action of the district

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court in rendering judgment on the pleadings in favor of the defendants is fully sustained by law.

Finding no error in the record, the judgment of the district court is affirmed, at the costs of the plaintiff in error.

Hainer, J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

NELLIE BROWN, D. G. TUTT, AND L. N. BEADLES V. MARY MASSEY.

(Filed September 20, 1907.)

(92 Pac. 246.)

1. **PLEADING—Cross-Petition.** Where, in an answer to a petition, the defendant makes allegations proper in his answer, which alleges facts upon which affirmative relief may be based, and such affirmative relief is prayed for by such answer, the same will be treated by the court as a cross-petition, regardless of what name the pleader may apply to it.
2. **SAME—Motions—Judgment on Pleadings.** Where a petition is filed by the plaintiff, and the defendant by his answer, in addition to the general denial, pleads facts which would warrant the granting of affirmative relief, and after filing such answer, and, before a reply is filed, the plaintiff by leave of court dismisses his action, the defendant will be allowed to pursue his remedy for affirmative relief as set up in his answer, and on a motion for judgment on the pleadings for the reason that the allegations of the answer asking for affirmative relief are undenied, the court should either sustain the motion, or rule the plaintiff to file a reply to the affirmative part of the answer so that the issue may be raised and tried by the court. A failure or refusal to do either is error, for which the case will be reversed.

(Syllabus by the Court.)

Error from the District Court of Logan County; before Jno. H. Burford, Trial Judge.

Reversed and remanded.

Devereux & Hildreth and Geo. W. Buckner, for plaintiffs in error.

Lawrence & Huston, for defendant in error.

Statement of the Facts.

STATEMENT OF FACTS.

This is the second time this case has been before this court. The record of the previous trial will be found reported in 13 Okla. 670, 76 Pac. 226. The original petition filed by Mary Massey alleged that she was the owner and in possession of lots seven and eight, in block sixty-one, in that subdivision of the city of Guthrie known as "Capitol Hill," and that the defendants Nellie Brown and D. G. Tutt claimed an interest or estate in said property, but that such estate was inferior to the title of the plaintiff, and by said petition she asks that her title be quieted. Service by publication was had, and a judgment by default rendered against Brown and Tutt. Within the time limited by statute, the defendants Brown and Tutt and L. N. Beadles filed an application to open the judgment and be allowed to plead, alleging that Brown and Tutt had sold their interest in the property to Beadles. The answer accompanying said motion for leave to plead was as follows:

"In the District Court of Logan County, Oklahoma Territory.
"Mary Massey, Plaintiff,

"v.

"Nellie Brown and D. G. Tutt, Defendants, and L. N. Beadles,
as Successor in Interests to Defendants, Defendant.

· "Answer to Petition of Plaintiff.

"Comes now the defendants and L. N. Beadles, successor in interest to defendants, permission of the court having been first obtained, and file this their joint answer to the petition of the plaintiff in this cause, and as matters of defense thereto charge and allege facts as follows, to-wit:

"(1) These defendants and their successor in interest in and to the real estate involved in this action deny each and every material allegation of fact and conclusion of law contained in said petition, except those that may be hereinafter especially admitted.

"(2) The defendants, Nellie Brown, D. G. Tutt, and L. N. Beadles, admit that they have, hold, and claim an adverse interest to plaintiff in lots numbered seven (7) and eight (8) in block numbered sixty-one (61) in that subdivision of the city of Guthrie, Logan county, Oklahoma Territory, known as 'Capitol Hill.'

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"(3) That defendants Nellie Brown and D. G. Tutt, at the time of the commencement of this action, and at the time of the issuance of the tax deed hereinafter referred to, and for a long time prior thereto, and at all times up to the date of filing the petition in this cause, were the absolute owners of the fee simple title to the above described real estate; and were during the whole period of said time in the actual possession of said real property, and remained undisturbed in their said possession.

"(4) That thereafter, on, to-wit, the 14th and 15th days of May, A. D., 1902, these defendants, for a valuable consideration, sold and conveyed all of their said title to said real property to defendant L. N. Beadles.

"(5) That on, to-wit, the 7th day of September, A. D., 1894, the county treasurer of Logan county, without authority of law, pretended to sell at tax sale the real estate involved in this action, for the alleged non-payment of taxes for the year A. D., 1893, at which time these defendants were the owners and in possession of said real estate, and said county treasurer did on said date make certificates of purchase to said property included to the county of Logan, Oklahoma Territory. And thereafter said county treasurer, without any authority of law, on, to-wit, the 10th day of May, 1898, pretended to re-sell said property for the sum of \$15.85, the amount of taxes, charges, penalties, and costs alleged to be due, and for which sum said property together with other property described in said deed was bid in by the county treasurer aforesaid, in the year A. D. 1894, aforesaid, for the further sum of money alleged to be subsequent taxes accrued and due thereon. While said property was held by the county of Logan under the sale aforesaid, the sum of \$——. And said treasurer did on the 10th day of May, A. D., 1898, again sell or pretend to sell said real estate with other real estate described in the deed to one S. S. Lawrence for the alleged sum of \$52.00 cash; and did on the 13th day of May, 1898, execute and deliver to said S. S. Lawrence a tax deed for said real property herein described together with other property described in said deed. And said tax deed was by the said S. S. Lawrence placed on record on said last mentioned date. A certified copy of said tax deed is hereto attached and made a part of this answer.

"(6) That thereafter said S. S. Lawrence attempted to convey said property by deed to the plaintiff in this action, Mary

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Massey, and upon which several pretended and illegal conveyances she brings this suit, and bases her claim to title to the real property herein described.

“(7) That said tax deed upon which the claims of plaintiff is based was placed on record in Logan county, Oklahoma Territory, on the said 13th day of May, A. D. 1898, and during the whole of the intervening time between the recording of this deed and the filing of this action by plaintiff, on, to-wit, the 28th day of January, A. D. 1902, these defendants were in possession of said real estate, and neither the purchaser at said pretended tax sale or his assign, the plaintiff herein, ever at any time brought suit for possession or otherwise took possession of said real estate, by reason of which, this action is barred by the statutes of limitation of the territory of Oklahoma, and said tax deed by operation of said statute become null and void.

“(8) That said tax deed upon which plaintiff herein claims title is void upon its face for the following, among other reasons: Said tax deed recited only three (3) certificates of purchase was issued by the treasurer of Logan county at said pretended sale for the following described property alleged to have been sold to said county, to-wit: For lots numbers three (3) and four (4) in block 53 and lots seven (7) and eight (8) in block number sixty-one (61) in the subdivision of the city of Guthrie known as ‘Capitol Hill’; and because said tax deed did not affirmatively show upon its face that said lots described therein were separately sold, and does not show for what sum said several lots separately sold for, and because said deed shows upon its face that said lots were collectively sold for the gross sum of \$15.85, the amount of taxes due thereon, and because said deed does not recite that said lots were, prior to the sale thereof, legally advertised for sale for the period of time required by law; and because said deed does not recite that said property has been separately assessed and charged or extended as required by law; and because said tax deed shows upon its face that said property was sold for non-payment of taxes subsequent to the pretended sale to the county of Logan on the 7th day of Sept., 1894, and prior to the alleged re-sale in 1898, during which period said property was not taxable, and said sale therefore is contrary to law. That said tax deed and all proceedings prior to the issuance thereof are void for the following reasons: Because said property was sold for the non-payment

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of the following illegal taxes levied, assessed, charged, and extended for the year 1893, to-wit, the following illegal levy: 'For county general purposes, including two (2) mills for the support of the poor, and contingent expenses, six mills on the dollar valuation, for county road and bridge purposes five (5) mills on the dollar valuation. For separate schools one (1) mill on the dollars valuation. all of which levies of taxes for said year A. D., 1893 are illegal and void, and for non-payment of said illegal taxes said property was sold, and for the reason that county clerk never certified said taxes down to the treasurer of Logan county with his warrant to collect the same for the said year A. D. 1893.

"(9) That the defendants have tendered to plaintiff all taxes, penalties, interest, costs, and charges due and accrued on said lots described in said tax deed, but she fails and refuses to accept the same, and defendants now tender into court for the use and benefit of said plaintiff for said taxes, interest, penalties, charges and costs.

"(10) Wherefore defendants pray that the tax deed issued herein and the conveyance thereon from Lawrence to plaintiff, each be declared null and void, and that the title to said real estate be quieted in these defendants, and for costs of suit, and all proper relief.

"BUCKNER & SONS,

"Attorneys for Defendants."

The district court refused to allow this motion. Brown and Tutt and Beadles appealed. The order of the district court was reversed, and the cause remanded with instructions to re-open the judgment and allow the plaintiffs in error to defend and to take such further proceedings as would accord with the supreme court decisions, and be consistent with right and justice in the premises. The mandate was filed in the district court of Logan county. In pursuance of the mandate, the original judgment of default was opened. The defendants were allowed to defend in said cause in accordance with the answer on file. But, in the same order opening the judgment and permitting the defendants to file their answer, the court made an order on the motion of the plaintiff, dismissing plaintiff's cause of action. At the time of the order of dismissal no reply or other pleading had been filed by Mary

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Massey to the answer on file in said cause. Subsequently the defendants Brown, Tutt and Beadles, the present plaintiffs in error, filed a motion for judgment on their answer and cross-petition. The court overruled this motion, to which the present plaintiffs in error duly excepted, and bring the case here for review

Opinion of the court by

IRWIN, J.: The assignments of error are two. First. That the court erred in refusing the defendants' motion for judgment, to which refusal the defendants excepted at the time. Second. That the court erred in ruling that the defendants' answer did not contain matter entitling them to affirmative relief, and in holding that the plaintiff had the right to dismiss the entire action, to which ruling of the court these plaintiffs in error duly excepted at the time.

It is apparent from reading the answer above set out that affirmative relief is claimed. The answer in plain and concise language sets up the facts that the plaintiff's tax deed, under which she claims title, is void; that plaintiffs in error have title in themselves; and the prayer is that the tax deed be declared null and void, and that the title to the real estate be quieted in these defendants. Now, we take it that it is immaterial what particular title the pleader may give to his pleading, or what he may call it, whether an answer or cross-petition; if the facts pleaded are sufficient to authorize the granting of affirmative relief, and affirmative relief is prayed for by the answer, then it is the duty of the court to treat it as a cross-petition, regardless of what the pleader may call it. Such seems to have been the holding of the California supreme court in the case of *Meeker v. Dalton*, 75 Cal. 154, 156, 16 Pac. 764.

"It is immaterial what the defendant calls his pleadings, whether he designates it as an answer or cross-complaint. Its character will be determined by the court. It is the facts set up in the pleadings which make it an answer or cross-petition."

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And in *Kimball v. Connor*, 3 Kan. 414, the Kansas supreme court say:

"The answer of Starks being sufficient, in substance, for the relief demanded, the court would not require the filing of a cross-petition in form, but would treat the answer as such petition and grant all just relief demanded."

This Kansas decision was a construction of the Kansas code on this subject, and was rendered prior to our adoption of the code, and consequently was adopted by this territory with the adoption of the code.

This identical answer was before this court and passed upon by this court as to its effect, and it was held that, if the defendant could establish the matters alleged in this answer, the tax deed was void. 13 Okla. 670-688, 76 Pac. 226. The answer concludes with a prayer that is affirmative in its character; that is, that the tax deed issued herein and the conveyance thereon from Lawrence to plaintiff each be declared null and void, and that the title to said real estate be quieted in these defendants, and for costs of suit and all proper relief. The answer sets up the particulars wherein the plaintiff's tax deed is void and asks for the affirmative relief of having it declared void and the title vested in defendants. It certainly seems to us that, if this language does not allege affirmative matter, we are at a loss to know how an answer could be so framed as to ask for affirmative relief. Our statute (chapter 24, article 1, section 1, Session Laws of 1899), which seems to us conclusive on this subject, provides:

"That a plaintiff may, on the payment of costs and without any order of the court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action. Any defendant or intervenor may, in like manner, dismiss his action against

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the plaintiff, without an order of court, at any time, before the trial is begun, on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing, and signed by the party or his attorney, and shall be filed with the clerk of the district court, the judge or clerk of the probate court, or the justice, where the action is pending, who shall note the fact on the proper record: provided, such dismissal shall be held to be without prejudice, unless the words, 'with prejudice,' be expressed therein."

Section 4289 of the Statutes of 1893 provides as follows:

"In any place where a set off or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear."

In the case of *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520, the Kansas supreme court say in the syllabus:

"1. Where a plaintiff files a petition in ejectment, and defendant in his answer, in addition to a general denial, states he is in possession of the same land, and claims to be the owner thereof by virtue of a tax deed and asks that his title thereto may be quieted against plaintiff, that part of his answer claiming title in himself and asking affirmative relief is a counterclaim.

"2. In such an action, when the plaintiff dismisses his cause of action, the defendant has the right to proceed to the trial of his claim, for the purpose of determining his interest in the land, as against the plaintiff. He then assumes all the burdens of a plaintiff, and is entitled to his rights, so far as amending his pleadings is concerned."

Now, under the provisions of our statutes, and under the holdings of the Kansas supreme court under an exactly similar statute, it is apparent that, while the plaintiff had a right at any time before final judgment to dismiss his action, it was not error on the part of the court to allow the plaintiff to dismiss so far as his petition was concerned, but the defendant, having filed an answer alleging facts sufficient to warrant, and having asked for affirmative

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relief, had the right to proceed with the case to final judgment so far as affirmative relief is concerned, and to have all the aid and assistance from the court which was necessary to secure such relief as he was entitled to under the pleadings. It is insisted by counsel for defendant in error that no exceptions were saved to the ruling of the court sustaining the motion of plaintiff to dismiss her action. We take it that it is immaterial whether exceptions were saved to this or not, as the dismissal of the case by the plaintiff under our statute would not affect or jeopardize the rights of the defendant after they had filed an answer containing affirmative matter and asking for affirmative relief. In other words, it is immaterial to defendants whether she dismissed her case or not, as under the law they had the right to proceed to final judgment so far as affirmative relief is concerned.

Now, it is apparent from this record that at the time the motion was made for judgment on the affirmative allegations of the defendants' answer, that such allegations were in no way denied. The answer was not attacked by any motion to separately state and number, or by any demurrer, neither was any reply filed. No pleadings of any kind or character were filed by the plaintiff whereby the affirmative allegations of the defendants' answer were denied. Section 4006 on page 782, Statutes of 1893, Oklahoma, contains this provision:

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true. * * *"

In the case of *Ballinger v. Lantier*, 15 Kan. 458, the Kansas supreme court say:

"The answer of the defendant, we think, was also sufficient; and, as it alleged some new matter constituting a defense to the plaintiff's petition, we think it needed a reply from the plaintiff."

Now, it seems to us that, when this motion for judgment on the pleadings was filed, the original cause of action as described

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in the petition having been dismissed, no reply of any kind having been filed, no demurrer and nothing which in any way controverted the allegations of the answer, under the plain provisions of our statute it then became the duty of the court to sustain this motion. But we are inclined to the opinion in the administering of exact justice between the parties the trial court could have the right to exercise some discretion in the granting or refusing of this motion. The circumstances of a case might be such that exact justice would require that the party who was in default of a reply should have the right to make such reply out of time. These affirmative allegations of the answer were sufficient, if answered, to raise an issue. That issue, if sustained on the part of the defendants, was in our judgment, sufficient to have warranted the giving of the relief sought, and the court, in the exercise of sound discretion, should have the right to compel the party making the allegation in the answer to prove the issue, and for this purpose should have the right to grant the plaintiff leave to file a reply in the nature of an answer, to raise this issue, and, when raised, to have it tried and decided by the court. But we think it was the plain duty of the court either to have sustained this motion for judgment on the pleadings, or to have ruled the plaintiff to file a reply in the nature of an answer. And, if such reply was filed, and such issue raised, to hear the evidence and try and determine this issue.

A refusal to grant the prayer of the motion for judgment on the pleadings, without making any order on the plaintiff to file a reply, and without putting the party making the motion in a position that he could secure from the court the rights to which he was entitled, was error for which this case should be reversed, which is accordingly done, at the costs of the defendant in error, with directions to the district court to rule the plaintiff to file a reply in the nature of an answer to the affirmative allegations of the answer within a short day to be named by the court, and, if such answer is filed, to hear the evidence and try and determine the

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issues, and, in default of such answer, to render judgment for the defendants on the pleadings.

Burford, C. J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

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(Filed September 26, 1907.)

(91 Pac. 1024.)

1. **CRIMINAL LAW—Dismissal as to One Defendant—Waiver of Objection.** Where two or more persons are included in the same indictment, the court may, at the request of the county attorney, dismiss as to any defendant for the purpose of making him a witness at any time in the trial before the defendants have gone into the defense; and where this is done after the jury are empaneled and sworn to try the case against all the defendants, and where the other defendants make no objection and save no exceptions, the same cannot be assigned as error in the supreme court.
2. **SAME—Correction of Verdict—Insertion of Names.** Where a jury in a criminal case have been ordered by the court in case they agree upon a verdict during the recess of the court to have the verdict so agreed upon signed by their foreman, sealed in an envelope and delivered to the foreman, and then are allowed to separate to meet at the convening of court at their jury rooms, and where the jury do so agree upon a verdict, and separate and at the next convening of court bring in a sealed verdict, which, on being opened, is found defective for the reason that it does not name the particular defendants found to be guilty, and where the court has ordered the jury to retire and correct their verdict by inserting the names of such defendants as they find guilty, and the jury do so retire and correct their verdict and return the same into court, such action of the court does not constitute reversible error.
3. **SAME—Review on Appeal—Sufficiency of Evidence.** Where there is evidence which reasonably tends to support the verdict of the jury, and such verdict is sustained by the court in refusing to grant a new trial, this court will not reverse the case on a question of fact.

(Syllabus by the Court.)

Statement of the Case.

Error from the District Court of Washita County; before James K. Beauchamp, Trial Judge.

Affirmed.

S. C. Massingale, J. A. Duff and L. R. Shean, for plaintiffs in error.

W. O. Cromwell, Attorney General, Don C. Smith and J. H. Cline, Assistants, for defendant in error.

STATEMENT OF THE CASE.

At the October term, 1905, of the district court of Washita county, Oklahoma Territory, a joint indictment was returned against George Hysaw, Oscar Steudle, John Steudle, and Charlie Steudle, charging them with the larceny of two domestic animals. The defendants were arrested and arraigned under this indictment on the 1st day of November, 1905, and then entered their plea of not guilty. On the 18th day of April, 1906, this case came on for trial under said indictment, the territory and defendant announcing ready for trial. After the jury had been selected and sworn to try the case, the defendant George Hysaw was discharged from the indictment that he might be used as a witness for the territory. Upon hearing the evidence adduced by the territory, the defendants offering none, the jury retired to consider of their verdict, under instructions from the court that, should a verdict be found by them during the hour of adjournment, such verdict should be signed by the foreman and sealed up and delivered to the foreman, after which the jury could separate until the reconvening of court, at which time the jury should reassemble and return their verdict into court at nine o'clock A. M. April 19, 1906. The jury arrived at a verdict during adjournment and separated, and returned a verdict at nine o'clock A. M. on the 19th of April, finding the defendants guilty as charged, but not specifying which of the defendants were found guilty. The trial judge then ordered the jury to again retire and say by their verdict which of the defendants they find guilty, and the jury again retired, and returned into

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court their verdict finding the defendants Oscar Steudle, John Steudle, and Charlie Steudle, guilty as charged in the indictment. Motion for new trial was filed, and, upon hearing the motion, was sustained as to the defendant John Steudle, and overruled as to Oscar Steudle and Charles Steudle. Judgment and sentence was pronounced upon the defendants Oscar Steudle and Charles Steudle, to which exceptions were saved, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: The first assignment of error is the court erred in directing the defendant George Hysaw to be discharged from the indictment on the application of the county attorney for the purpose of using him, the said George Hysaw, as a witness for the territory, after the jury had been empaneled and sworn to try the case against all of said defendants, under one joint indictment. As to this assignment of error, the record shows the following facts (pages 9 and 10 of the record):

"County Attorney: We desire to dismiss this case as to George Hysaw, one of the defendants. The Court: What is the purpose of that? County Attorney: We desire to use him as a witness. Mr. Massingale: I would like an expression from the county attorney as to the effect now of this dismissal. I understand under the statutes that the rule is where there is a joint indictment under certain circumstances the county attorney might dismiss as to one defendant for the purpose of using him as a witness. The Court: I understand that is what he wants; that is what he stated, to use him as a witness. Mr. Massingale: That dismissal is an acquittal. The Court: Yes, sir; the defendant Hysaw is discharged."

Now, no exception of any kind or character were saved to this ruling of the court, and, from the foregoing colloquy between the county attorney, the attorney for the defendants, and the court, it would reasonably be inferred that this ruling of the court was entirely satisfactory. We think the dismissal was clearly within the power of the court, and was not error, but whether

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error or not it was not excepted to and exceptions were not saved, and it is not presented to this court in such a way that error could be assigned on it.

The second assignment of error is that after the jury had returned into court a sealed verdict finding the defendants, not naming them, guilty as charged, it was error on the part of the court to have the jury retire to their jury room and find a verdict naming the defendants found guilty. Section 5530, at page 1237, Wilson's Statutes 1903, provides that the court may order the jury to seal up their verdict where they agree on a verdict during a temporary vacation of the court, and that they shall return their verdict into court at the next convening of court, and also provides that they may separate after so signing and sealing their verdict. Section 5539, page 1239, Wilson's Statutes 1903, provides: "If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it. * * *" This verdict as first returned by the jury found all of the defendants guilty as charged in the indictment. This, of course, could not apply to the defendant Hysaw, who had been, by order of the court, previously dismissed out of the case, but it necessarily found all the other defendants guilty as charged in the indictment. The failure to insert the specific names of the particular defendants in the verdict could at best have been only an irregularity. It could only render the verdict defective in form, and we think it was clearly within the province of the court to order the jury to retire and correct their verdict, and the inserting of the particular names could have worked no hardship to either of the defendants, and is not such an error, if error at all, upon which a reversal could be predicated.

The only remaining assignment of error is that the court erred in refusing to grant the defendants Oscar Steudle and Charles Steudle a new trial for the reason that the evidence was not sufficient to warrant their conviction. We have examined the entire record, and we think there is ample and sufficient evidence

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to sustain the finding of the jury, and under the well-recognized rule in this court that, where there is evidence reasonably tending to support the finding of the jury, this court will not disturb or reverse the case on a question of fact.

Having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, with directions to the sheriff of Washita county to proceed with the enforcement of the judgment and sentence of the district court.

Pancoast and Garber, JJ., absent; all the other Justices concurring.

CHARLIE COOPER V. TERRITORY OF OKLAHOMA.

(Filed September 20, 1907.)

(91 Pac. 1032.)

1. **CRIMINAL LAW—Testimony of Accomplice—Corroboration Required.** One accused of a crime cannot be convicted upon the uncorroborated testimony of an accomplice, and the corroboration required must be the proof of substantial facts tending to incriminate the accused, aside from and without the aid of the testimony of the accomplice.
2. **SAME—Weight of Evidence.** Where there is competent corroborating evidence tending to connect the accused with the commission of the crime charged, the weight of such evidence is a matter for the jury; but, where the corroborating evidence is of such an uncertain and unsatisfactory character as not to warrant a reasonable inference of guilt, the court should set aside the verdict.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Reversed and remanded.

Al J. Jennings, for plaintiff in error.

P. C. Simons, Att'y Gen'l, and *Don C. Smith, Ass't*, for defendant in error.

Opinion of the Court.

Opinion of the court by

BURFORD, C. J.: The plaintiff in error, Charlie Cooper, was charged by indictment jointly with Henry Cooper, Dave Ellis, and Richard Ellis with the crime of horse stealing. The defendants, Henry Cooper, Dave Ellis, and Richard Ellis pleaded guilty to the charge, and the plaintiff in error pleaded not guilty. He was tried to a jury, a verdict of guilty returned, and sentenced by the judgment of the court to three years' imprisonment in the penitentiary.

The contention of plaintiff in error is that he was convicted upon the corroborated evidence of accomplices. The defendants were all boys residing in Comanche county where the crime was committed. The horses stolen belonged to a German farmer named Andrew Zach, and were kept in a pasture near his home. On Sunday night, November 13, 1904, two of the horses were stolen from the pasture, and were traced to near Foss, in Washita county, and there found in the possession of John Pruitt and Robert Ellis. The evidence for the prosecution consisted of the testimony of Andrew Zach, the owner of the horses; John Pruitt, who testified that he participated in the larceny and had not been indicted; Dave Ellis, a co-defendant, who pleaded guilty to the crime; C. R. Saunders, the officer who made the arrest of the plaintiff in error; Albert Dillon, a neighbor of Zach's. and John Ellis, the father of the Ellis boys who were implicated in the crime. The witness Zach testified only as to the loss and recovery of the horses. He gave no testimony as to the parties charged with the crime. John Pruitt testified that on the Sunday the horses were stolen he and Charlie Cooper, Henry Cooper, Dave Ellis, and Richard Ellis entered into an agreement to steal some horses, and that pursuant to this agreement they went to the pasture of old man Zach after night and stole the two horses in question; that Charlie Cooper was present and assisted in catching the horses and in taking them out of the pasture, and on the road they were turned over to him and Robert Ellis to take away and dispose of.

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He also stated that he and Charlie Cooper and Robert Ellis rode together to the place where the horses were stolen, while Dave Ellis and Henry Cooper went another direction to look for some Indian ponies, but met them again and they all were at the pasture when the horses were taken from the pasture. He also testified that Charlie took off his belt and put it on the neck of one of the horses, and the belt was dropped and lost. This lost belt was found by Mr. Zach, and was produced at the trial, but there was a disputed question as to whose belt it was. He also testified that Charlie Cooper wore boots on the night of the larceny with tacks in the soles. Dave Ellis testified to substantially the same state of facts, admitted that he and Harry Cooper went away from the Cooper place first, and afterwards met the other three, Charlie Cooper, John Pruitt, and Robert Ellis, and went together to the Zach pasture, and stole the horses. He also testified that a glove which was found at the place of the larceny was dropped by Harry Cooper. Albert Dillon testified that he lived about three-fourths of a mile south of the Zach place, and that he saw Harry Cooper and Dave Ellis pass his place going south about dark. Charles R. Saunders testified that he was deputy sheriff and made the arrest of the plaintiff in error; that on Tuesday after the larceny he went to Zach's place and made an examination of the pasture and the fences; that he found where a post was broken down, and found horse tracks, and the track of a person at the point where the post was down; that in the tracks of the person there were the imprints of nails in the sole of the shoe or boot; that the bottom was full of nails or tacks; that the track was about the size of a six or seven shoe; that two or three weeks later he arrested Charlie Cooper at his home, and that the boots he was wearing were boots that would make about the sized track as the one found in the Zach pasture, and that he had the bottom of his boots full of nails. He made no measurement of either the boots or the tracks, but estimated the size by putting his own foot in the tracks. John Ellis, father of Robert and Dave, testified that he had seen Charlie

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Cooper frequently, and that he usually wore a belt, but that he had seen him wear different ones, and he would not state whether the one exhibited was his or not. He also testified that his son Robert was then in the penitentiary for this same offense, and David was present as a witness for the territory.

Upon this testimony the territory rested. The defendant then went upon the stand in his own behalf and testified that Pruitt, the two Ellis boys, and his Brother Harry left his father's house about 12 or 1 o'clock P. M. on Sunday, and that he did not go with them; that he stayed at home until about four o'clock, when he went to Mr. Richardson's, and stayed until about dark. He then returned directly home, and went to bed with his brother George, who was in bed at the time. That he had an intimation that those boys were getting his younger brother, Harry, into some difficulty, and, after Harry Cooper and Dave Ellis left, he ordered Pruitt and Robert Ellis off his father's place; that he found out they were going to do something, but did not know what it was, and had no knowledge of the larceny until after it became public. He also stated: That at the time of the larceny he was wearing boots with tacks in the bottoms; that no one ever examined his boots after he was arrested. Harry Cooper testified that he was 14 years of age, a brother of the accused; that he had pleaded guilty to the charge in the indictment; that he, Dave Ellis, John Pruitt, and Robert Ellis stole the horses from the Zach pasture, and that his brother, Charlie, was not present. That the belt and glove found in the pasture were his, and that he was wearing them at the time of the larceny. That he had nails in the bottoms of his shoes, and made the tracks testified about. He exhibited the shoes worn at the time, with tacks in the soles. That he and Dave Ellis left the Cooper home about 12 o'clock on Sunday afternoon, and rode north to see about some Indian horses; that when they returned they met John Pruitt and Robert Ellis about a mile north of the Cooper place with three horses, leading one and riding two. Robert Ellis had left the horse he rode away in the af-

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ternoon, and was riding a gray horse. He left the others about 11 o'clock and returned to his home and got there about 12 o'clock. It is seven miles to the Zach place, where the horses were stolen. George R. Cooper testified that he is a brother of the defendants, and lived with his father at the Cooper home. He left home on Sunday morning and went to visit an uncle six miles away, and remained until about dark; that he went to bed early and his brother Charlie came in about eight or nine o'clock and went to bed with him; that his brother Harry and Dave Ellis came in after he had been asleep three or four hours—he was unable to give the time, but it was very late. He also identified the belt in evidence as belonging to his brother Harry. W. A. Richardson testified that he is a farmer and lives in the Cooper neighborhood; that Charlie Cooper came to his place on Sunday, the 13th of November, about 3 o'clock in the afternoon, and remained there until about dark, or until a little after. Edward Isbell testified that he lives about one and a half miles from Cooper's place; that he saw Charlie Cooper at Richardson's place on the afternoon of Sunday, the 13th of November, between five and six o'clock. He also testified that Charlie Cooper's reputation for truth and honesty was good in the neighborhood. Mrs. S. J. Fulcher testified to the good reputation of Charlie Cooper for truth and honesty. William Naggs, a neighbor of the Coopers, testified to the good reputation of Charlie for truth and honesty.

The foregoing testimony embraces all the substantial facts in evidence. No witness for the prosecution, other than the confessed accomplices, has in any way connected the accused with the commission of the crime, and no witness has put him in company with them at any time or place after they left the Cooper home. The only facts relied upon as corroboration of the accomplices are the belt and tack prints in the tracks. The belt was not shown to be his by any of the witnesses, and there was positive testimony to the effect that it was not his, while the tack prints could have as easily been made by some of the guilty criminals.

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The law forbids the conviction of one accused of crime upon the uncorroborated evidence of accomplices, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. To warrant a conviction upon the testimony of an accomplice, there must be corroborating evidence tending to incriminate the accused, aside from and without the aid of the testimony of the accomplice. The corroboration will not be sufficient if it tends merely to raise a suspicion as to the guilt of the accused. *People v. Ames*, 39 Cal. 403; *People v. Warren*, 39 Cal. 661. *People v. Thompson*, 50 Cal. 481. This court said in *Hill v. Territory*, 15 Okla. 212, 79 Pac. 757: "In a prosecution for burglary, where the evidence of an accomplice is corroborated by other evidence which tends to connect the defendant with the commission of the offense, the weight of such corroborating evidence is a matter for the jury. After verdict found based upon such evidence, this court will not disturb the judgment." It must be understood that what was there meant is that there is some substantial evidence corroborating the accomplice and tending to connect the accused with the commission of the offense. But, where the corroborating evidence is of such a slight, uncertain, and unsatisfactory character as not to warrant a reasonable inference of guilt, the court should not permit a verdict to stand. We think the corroborating evidence in this case is of this character, and it was error to overrule the motion for new trial.

The judgment of the district court is reversed and cause remanded, with directions to the district court of Comanche county to grant a new trial.

Gillette, J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

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STARK BROTHERS V. FRANK S. GLASER AND A. PFIFER.

(Filed September 20, 1907.)

(91 Pac. 1040.)

1. **JUDGMENT—Motion to Vacate—Time of Decision.** Under the statutes of this territory, the district court has power to vacate or modify its own judgments or orders at or after the term at which said judgment or order was made. Where the allegations to vacate a judgment are based upon division 3 of section 562 of chapter 66 of Wilson's Statutes of Oklahoma 1903, for irregularity in obtaining a judgment or order, and where the motion to vacate the judgment is made at the same term at which the judgment was rendered, a reasonable notice being given to the adverse party or his attorney, the court has jurisdiction to hear the matter, although the motion is not decided until a subsequent term.
2. **PUBLIC LANDS—Homestead Entries—Exemptions.** Lands acquired under the provisions of the United States statute for the homesteading of public lands are not liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor. The terms of this section exempt all lands obtained under the homestead law from liability for any of the debts of the entryman prior to the issuing of the patent, whether the lands are still held by him, or by a *bona fide* purchaser deriving title through him.

(Syllabus by the Court.)

Error from the District Court of Kay County; before Bayard T. Hainer, Trial Judge.

Affirmed.

Cline & Duval, for plaintiffs in error.

A. H. Meyer and Doyle & Cress, for defendants in error.

STATEMENT OF THE CASE.

This is an action commenced in the district court of Kay county, Oklahoma, in February, 1904, against the defendant Stark Brothers, plaintiffs in error here, to quiet title to the north half of the northwest quarter of section fifteen, township twenty-six north, of range two east of the Indian Meridian, in Kay county,

Statement of the Case.

Oklahoma Territory. Plaintiffs in their petition state that they are the owners, and in actual possession of said land; that the defendants claim an estate in said lands adverse to these plaintiffs, the nature of said adverse claim being that defendants claim a lien contract made with one Fred Bower, who was the original entryman of said land, and that said lien contract is of record, and is a cloud upon plaintiff's title. Plaintiffs ask that said cloud be removed. The defendants filed an answer and cross-petition, alleging that on the 21st day of August, 1894, Fred Bower was the owner of and in possession of the said land; that on said date the defendants sold to said Bower a bill of fruit trees for the sum of \$450; that said Bower entered into a written contract with defendants, whereby said Bower gave to these defendants a lien on said land for the performance of said contract, and pleaded a copy of said contract, asking affirmative relief, that the said contract be declared a first lien. The contract is as follows:

"Form 9-y.

"THIS INDENTURE made and entered into on this 21 day of Aug. A. D. 1894, by and between Fred Bower, of K. County, (residence one mile N.) county of K and of Oklahoma Ter. party of the first part, and Stark Bros. of Louisiana, county of Pike and state of Missouri, parties of the second part:

"WITNESSETH: That the said party of the first part in consideration of said parties of the second part selling and shipping to him in the fall of 1894 to Cross, railroad freight charges prepaid, (—) fruit trees, binds himself, his heirs, and assigns to carefully plant and care for said trees on his farm containing eighty acres, situated in K county, Oklahoma, and more particularly described as follows, to-wit: N. $\frac{1}{2}$ N. W. section 15, township 26, range 2 E., boundaries [here give name of adjoining owners] D. Mooney to the west and Thomas Goozdanover on the east and — and to pay to the order of said second parties, their heirs, or assigns, as evidence by first party's nine (9) promissory notes to be executed by said first party to second parties when the aforesaid trees are shipped, four hundred & fifty dollars (\$450.00) due and payable as follows—all deferred payments and interest hereafter particularly specified to date from the first day of—

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189—: one-tenth when trees are shipped, one-tenth in one (1) year, one-tenth in two (2) years, one-tenth in three (3) years, one-tenth in four (4) years, one-tenth in five (5) years, one-tenth in six (6) years, and one-tenth in seven (7) years, one-tenth in eight (8) years and one-tenth in nine (9) years, with interest at the rate of six (6) per cent. per annum, and if the interest be not paid annually the same is to become as principal and bear the same rate of interest; to the payment of which sums as the same shall become due the party of the first part binds himself, his heirs, assigns and grantees of and to the aforesaid described lands; the right being reserved to the said party of the first part to pay the full amount remaining unpaid and not yet due, together with accrued interest, at any time he may elect within the period of nine years next after date last above written.

"And the said first party for the purpose of obtaining the aforesaid trees states that the above described real estate is free and clear of encumbrances, and that he claims the same with a perfect homestead.

"In witness whereof, we have hereunto set our hands and seals this the day and year first above written.

"FRED BOWER, (Seal.)

"STARK BROS. (Seal.)

"Witnessed by W. E. Morlan.

"Oklahoma Territory, County of K. ss.

"Be it remembered that on the 22nd day of Aug. 1894, personally appeared before me, Fred Bower, and acknowledged the execution of the above contract.

"In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Cross, O. T., the day and year first above written.

"G. Q. BRANINE, *Notary Public.*

"[Seal] My term expires Dec. 8, 1897."

Endorsed on back: "Fred Bower, to Stark Bros. Fruit tree contract. Territory of Oklahoma, K County, ss. Filed for record this 21 day of Sept. A. D. 1894 at 12 o'clock M., recorded in Mis. Book 1, page 105. J. C. JAMISON, Register of Deeds. [Seal.]"

To this answer and cross-petition plaintiffs filed a reply. In said reply plaintiffs allege as a defense to said cross-petition that at the time of the execution of said contract Fred Bower, the

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maker thereof, was and now is a married man and the head of a family, and at the time he was living with his family on said land as a homestead, and at no time did the wife of said Bower sign said contract, or contract for said fruit trees in writing, or otherwise, or consent to the same, and for this reason the said contract created no lien against said homestead. For a further defense, plaintiffs allege that at the time of making said contract the title to said land was in the United States government; that the said Fred Bower, who was the maker of said contract, was a homestead entryman on said tract of land, and that no final proof had been made, and no patent issued, and for this reason the said land was not liable for the debt created by the purchase of said fruit trees as evidenced by said contract, and for a further reply and defense, plaintiffs allege a failure on the part of the defendant Stark Brothers to perform their part of the contract, and in said reply plaintiffs ask that said contract be declared by the court not to be a lien on said real estate. On September 7, 1904, plaintiffs filed a motion for judgment on the pleadings. On the 16th of February, 1905, said motion for judgment on the pleadings was overruled. On the 15th of April, 1905, defendants demurred to plaintiffs' reply. On the same day the court sustained the demurrer to said reply. On the 17th day of April, 1905, defendants filed a motion for judgment on the pleadings. On the 10th of July, 1905, the court sustains the motion of defendants for judgment on the pleadings, and renders judgment in favor of the defendants and declared the contract to be a first lien, and directs the issuing of an order of sale. On the 17th of July, 1905, the clerk of the district court of Kay county issued an order of sale. On the 14th of July, 1905, the plaintiffs filed a motion in the district court to set aside the judgment on pleadings, in favor of defendants, rendered on July 10, 1905, and on August 31, 1905, the court issued an order staying proceedings upon the judgment of July 10, 1905, and order of sale, upon the plaintiffs filing bond in the sum of \$200. On August 31, 1905, plaintiffs filed bond. On the 12th

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of September, 1905, the court rendered judgment sustaining the motion to set aside the said judgment in favor of the defendants rendered on July 10, 1905, and re-instated the cause upon the docket of the court for trial, and to which ruling the defendants excepted, and asked for time to prepare and serve a case-made on appeal to the supreme court, and are granted 30 days in which to make and serve a case-made, ten days to suggest amendments, to be signed and settled on three days' notice in writing by either party. After which the plaintiffs made application for leave to file an amended reply, which leave was granted, to which the defendants excepted. The cause was then docketed for trial at the next regular term of this court. On the 12th of September, 1905, defendants in error here, plaintiffs below, filed their amended reply and answer to the cross-petition. On the 19th of September, 1905, defendants filed a motion to require the plaintiffs to separately state and number their defenses. On the 20th of March, 1906, this motion is by the court overruled. On the 21st of March, 1906, said cause comes on for hearing on the motion of plaintiffs for judgment on the pleadings, and the motion of defendants for judgment on the pleadings, at which time the following admission was made by the defendants, and the following judgment was rendered by the court:

"It is admitted by the defendants, for the purpose of the court passing on the motion of the plaintiffs for judgment on the pleadings, that at the time that Fred Bower, mentioned in defendants' cross-petition, executed the contract attached to said cross-petition, he was the homestead entryman of the land described in said cross-petition, and was a married man and the head of a family, and that he and his family were residing on said land, and that the final proof for said land had not been made, and that the patent from the United States for said land was not issued until about the year 1898, or 1899, about which time patent was issued to said Fred Bower."

Thereupon the court ordered that the motion of the defendants for judgment on the pleadings be overruled, and the mo-

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tion of plaintiffs for judgment on the pleadings should be sustained. Thereupon the court rendered judgment in favor of the plaintiffs, declaring the contract in evidence to be no lien upon the land, and taxed the costs to the defendants, to which the defendants excepted, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: Three grounds of error are assigned by plaintiffs in error for a reversal of this case, but we think it will only be necessary to discuss two of them.

The first one is it is insisted that "the court has no power to set aside a judgment rendered during another term of court, except it be set aside for the reasons and in the manner provided by law. The proceedings in this case, if there were any grounds to set aside said judgment, should have been by petition verified by affidavit, on which summons should have issued and been served the same as in the commencement of an action, neither of which was done in this case; and the court was, therefore, without jurisdiction." In support of this contention, plaintiff in error purports to quote from the record. He says the "record in this case shows that on a day set by the supreme court of the territory of Oklahoma as a day for the district court of Kay county, Oklahoma Territory, to-wit, July 10, A. D. 1905, judgment was rendered by the trial court in this cause in favor of the plaintiffs in error, for the sum of \$834.32, which said amount was decreed a first and prior lien on said land; and said land was ordered sold as provided by law to satisfy the same. [See pages 21 and 22 case-made.] And that thereafter, to-wit, July 17, 1905, the clerk of the district court of Kay county, Oklahoma Territory, issued an order of sale as provided in said decree; which order of sale was later recalled by the judge of the district court. And that long after the adjournment of said court, and on the first day of the succeeding term of said court, to-wit, September 11, 1905, the defendants in error filed their motion to vacate said judgment [See page 27

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case-made], which said motion was sustained on September 12, A. D. 1905, and the aforesaid judgment thertofore rendered on July 10, 1905, was vacated and set aside."

While it is true the case-made at page 27 does show that a motion to vacate this judgment was on that day filed by the plaintiffs, the case-made also shows on page 23 a motion to vacate the judgment of the court rendered on July 10, 1905, in favor of the defendants on the pleadings was filed on July 14, 1905. The only way we can account for this apparent discrepancy in the record is that the motion to vacate the judgment was filed on July 14, 1905, as set forth in the record, and by inadvertence of the clerk the same motion was refiled on September 11, as shown by the case-made at page 27. If this case-made is correct, and speaks the truth, this can be the only theory upon which this apparent conflict can be reconciled, because the record clearly states that this motion was filed on July 14, 1905, and the record gives the motion together with the signature of the attorneys. This motion must have been filed, or its record would not appear in the case-made, and it might be, and probably was, the fact that this filing was overlooked by the clerk, and it was refiled, as shown on page 27, on September 11th. This being true, that the motion to vacate the judgment was filed during the same term at which the judgment was rendered, and within four days from the time the same was rendered, we think confers jurisdiction upon the court, providing notice was given to the opposite party or his attorney, and the fact that the court may have continued the hearing on the motion until a subsequent term would not deprive the court of jurisdiction. It is apparent from the record that the attorneys for the defendants did have notice of the filing of the motion to vacate the judgment, as it is found by the court in the order staying the proceedings on the judgment and order of sale as contained in the case-made at page 24 this language is used: "Now, on this 30th day of August, 1905, come the plaintiffs above named by Thomas H. Doyle, one of their attorneys, and the defendants

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appearing by W. S. Cline & Duval, and this cause coming on to be heard before the undersigned judge of the 4th judicial district at chambers in the city of Perry, at the hour named in the notice given by plaintiffs to defendants upon judgment rendered in the above-entitled cause on the 10th day of July, 1905, and it appearing that defendants have had reasonable notice of this application, and it further appearing that said plaintiffs have filed a motion duly verified to set aside the judgment so rendered and order of sale decreed in the above-entitled cause by reason of irregularities in obtaining said judgment and order of sale and by reasons alleged that said judgment was rendered and said order of sale was made before said action regularly stood for trial."

This language of the court in his journal entry staying the judgment and order of sale is material for two purposes in this case, as it shows that the adverse party or his attorney has had notice of the filing of the application to set aside the judgment, and it shows the further fact that said motion to vacate and set aside the judgment must have been filed at an earlier date than the date mentioned in the case-made at page 27, to-wit, September 11, 1905, because this order staying the judgment was made on the 30th day of August, and it recites the application is on file, and tends to corroborate the position of defendants in error that their motion to vacate the judgment was filed July 14, 1905, as shown by the case-made, page 23. Running section 4760 (section 562, chapter 66, Wilson's Rev. and Ann. Statutes of Oklahoma, 1903) provides: "That the district court shall have power to vacate or modify its own judgments or orders at or after the term at which said judgment was made. * * * Third, for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order * * * ." Running section 4761 (section 563, chapter 66) provides: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order shall be by motion, upon reasonable notice to the

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adverse party or his attorney in the action * * * .” Running section 4762 (section 564 of the same chapter) provides the proceedings to vacate or modify the judgment or order on the grounds mentioned in subdivisions 4, 5, 6, 7, 8, and 9, section 562 shall be by petition, “verified by affidavit, * * * and also providing for a summons.” But we think a reading of the motion in this case and the journal entry of the court sustaining said motion will show that this motion was based on the third subdivision of section 562, to-wit, irregularities in obtaining the judgment or order, and being such, and the motion being filed four days after the rendering of the judgment, to-wit, July 14, 1905, and being at the same term at which the judgment was rendered, and the court having found by his journal entry that the opposite party or his counsel had due notice of the filing, we think it brings it clearly within the provisions of section 563, and was sufficient to give the court jurisdiction of the same. Now, we think the mere fact that the court from pressure of business, or from any other reason, allowed the matter to go over until the next term, would not deprive the party of his rights to be heard. He had filed his motion in apt time, had given the legal notice required by the statute, and had placed his motion on the docket of the court, and done all he could do, and all he was required to do to bring the case within the jurisdiction of the court, and we think the fact that the motion itself was not heard until a subsequent term would not deprive the court of jurisdiction. Hence we think on this point the entire argument of counsel for plaintiffs in error is based on an erroneous interpretation of the record.

Another reason why we think the court had full and complete jurisdiction to vacate the judgment rendered in favor of the plaintiff in error on July 10, 1905, is that the statutes of this territory (Wilson’s Stat. action 563, chapter 66) provide: “ * * A motion to vacate a judgment because of its rendition before the cause regularly stood for trial can be made only in the first three days of the next succeeding term.” The record in this case,

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page 51, shows that this hearing and decision of the court to vacate the judgment was had on September 12, which was the second day of the succeeding term of the court after the rendition of the judgment sought to be vacated, and was clearly within the time prescribed by statute. The same section, fixing the time as the first three days of the next succeeding term, provides it shall be by motion.

There remains but one other assignment of error unanswered to be considered. In the second assignment of error counsel for plaintiff in error say:

"The defendants in error purchased the land involved with full knowledge of the existence of the lien of the plaintiffs in error, and are estopped from denying the validity of the said lien, or the power and authority to make and execute the same. If the contract in question is defective for the reason that the same was not executed by the wife of Fred Bower, the same could only be avoided by her. The fact that at the time of the execution of said contract the land was government land, the title to which was in the United States, made it unnecessary for the wife to join in any conveyance relating thereto, as the laws of Oklahoma relating to the conveyance of the homestead do not apply."

In this statement of his assignment of error counsel for plaintiffs in error overlooked one very material legal proposition, and that is that land acquired under the homestead laws of the United States is not liable for any debts contracted by the entryman prior to the issuing of his patent. Now, it is conceded in this case (record, page 60), by the admission of the parties, that at the time of the contracting of the debt evidenced by this contract, Bower was a homestead entryman; that he was living upon the government land with his family as a homesteader; that final proof had not been made; and that the patent was not issued, and did not issue for at least four years after this instrument was made. This admission brings it clearly, in our judgment, within the provisions of the United States homestead law, and exempts it from any debt or liability created prior to the issuing of the patent. But it is contended that, as the plaintiffs in this

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case were the grantees of Bower, who was the homestead entryman, the right of Bower of having this land held to be free from the lien of any debt created prior to the issuing of the patent would not extend to them, but would be personal to Bower. But various courts who have had this question before them for adjudication have held to a contrary doctrine, and have laid down the rule to be that: "The terms of this section [referring to the homestead law] clearly exempt all lands obtained under the acts of which it is a part from liability for any of the debts of the entryman incurred prior to the issuance of the patent, whether the lands are still held by him or by a *bona fide* purchaser deriving title from him." *Russell v. Lowth*, 21 Minn. 167; *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Smith v. Steele*, 13 Neb. 1; *Baldwin v. Boyd*, 18 Neb. 444; *Clark v. Bayley*, 5 Oregon, 342. These authorities, in our judgment, settle this contention in favor of the defendants in error.

The assignments of error alleged by counsel for plaintiffs in error for a reversal of this case should not be considered by this court, for the reason that nowhere in the record does it appear that any motion for a new trial was presented to the court, or the attention of the court called, by motion for a new trial, to the errors complained of, and no motion for new trial was made and ruled upon by the court and excepted to and assigned as error. This court, in the case of *Boyd et al. v. Bryan*, 11 Okla. 56, 65 Pac. 940, says: "Error of law occurring at the trial and excepted to by the party making the application will, when embraced in the motion for new trial, present to trial court any objection or exception properly made and saved during the progress of the trial." In the case of *Osborne & Co. v. Case et al.*, 11 Okla. 479, 69 Pac. 263, this court says: "This court has repeatedly held, in fact it is the settled rule of this court, that alleged errors occurring during the trial not raised in the trial court or set forth in a motion for a new trial will not be considered for the first time on appeal." In *Hardwick et al. v. Atkinson*, 8 Okla. 609, 58 Pac. 748, this

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court says: "Alleged errors occurring in the trial not raised in the trial court or set forth in the motion for a new trial will not be considered for the first time in this court." In *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944, it is said: "All matters occurring on the trial which are proper causes for a motion for new trial will be deemed to be waived unless presented by motion for new trial, and this court will not consider them after having been once waived." In *High v. United States et al.*, 14 Okla. 399, 78 Pac. 100, it is said: "A case-made which does not contain a copy or statement of * * * any motion for a new trial * * * presents no question to this court for review." In the case of *Martin v. Gassert*, the Oklahoma supreme court, reported in 17 Okla. 177, 87 Pac. 586, says: "Where the palintiff fails to assign as error the overruling of the motion for new trial in the petition in error, no question is properly presented to this court to review error alleged to have occurred during the progress of the trial in the court below."

A reading of the contract relied on by plaintiffs in error for a lien against the land in question will show, we think, that it is very doubtful whether the language employed in that contract would be sufficient to create a lien in any event. It certainly would not be held sufficient in a mortgage, and this contract would be somewhat in the nature of a mortgage. Nowhere in the contract is it made expressly a lien upon the land. The most liberal construction for the plaintiffs in error that could be made of the contract would be that the party making the contract bound himself and attempted to bind whoever might be the grantee of the land, but he did not, in express terms, make the contract a lien upon the land, and we are inclined to the opinion that the language used is too vague and uncertain to be considered by this court as a lien against and running with the land. But, however that may be, for the reasons herein expressed, we are of the opinion that the decision of the district court in rendering judgment in favor

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of the plaintiffs on the pleadings was correct and is sustained by the authorities.

The decision of the district court is affirmed, at the costs of the plaintiffs in error.

Hainer, J., who presided in the court below, not sitting; Burford, C. J., dissenting; all the other Justices concurring.

BURFORD, C. J. (dissenting): The law as stated in this opinion is in direct conflict with the well-considered opinion in *Stork et al. v. Duval et al.*, decided by this court in 1898, and reported in 7 Okla. 213, 54 Pac. 453, and no reference is made to said cause. See, also, *Farriss et al. v. Deming Investment Co.*, 5 Okla. 496, 49 Pac. 926, and *Flanagan v. Forsythe*, 6 Okla. 225, 50 Pac. 152. In my opinion the contract in question constitutes a lien created by contract of the owner, and comes within rule stated in *Meinhold v. Walters*, 102 Wis. 393; *Fuller v. Hunt*, 48 Iowa, 163; *Dickerson v. Bridges*, 147 Mo. 235; *Orr v. H. Ulyatt*, 23 Nev. 134, 43 Pac. 916; *Lang v. Morey*, 40 Minn. 396; *Forgy v. Merryman et al.*, 14 Neb. 513; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400; *Newkirk v. Marshall et al.*, 35 Kan. 77; *St. Louis Mining & Milling Co. v. Montana Co.*, 171 U. S. 656.

METROPOLITAN RAILWAY COMPANY, a Corporation, v. J. T. MARTIN.

(Filed September 20, 1907.)

(91 Pac. 1034.)

1. **APPEAL—Review—Sufficiency of Evidence.** Where there is evidence in the case which reasonably tends to support the special findings of the jury, and the general verdict, the decision will not be reversed on a question of fact.
2. **SAME—Inconsistency of Findings** Where there is a reasonable theory, deducible from the evidence in the case, upon which the special findings of the jury and their general verdict are sustained, the court will not disturb the general verdict because

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another theory may be drawn from the evidence with which the special findings and the general verdict are inconsistent. The court will not examine the evidence with a view to ascertaining if it is possible to evolve from the evidence a theory upon which an inconsistency may be discovered between the special findings and the general verdict.

(Syllabus by the Court.)

Error from the District Court of Oklahoma County; before B. F. Burwell, Trial Judge.

Affirmed.

Shartel, Keaton & Wells, for plaintiff in error.

S. A. Byers and Grant & McAdams, for defendant in error.

STATEMENT OF THE CASE.

This was an action begun by J. T. Martin against the Metropolitan Railway Company in the district court of Oklahoma county on December 16, 1903. The petition claims damages for personal injuries received by the plaintiff by being thrown from a car of the defendant by the negligence of the defendant in running their car at an unusual high rate of speed around a curve, and running by the usual stopping place for passengers after the signal had been given to stop, and that in consequence of such high rate of speed at that point, and the running by the usual stopping place, and the fact of the car going around a curve, caused the plaintiff to be thrown from the car and injured. To this petition defendant filed an answer, said answer containing a general denial of the allegation of the petition, and also the allegation of contributory negligence on the part of the plaintiff, to which answer the plaintiff filed a reply of general denial. Upon these pleadings the case was tried to a jury, and a verdict rendered for \$1,250 in favor of the plaintiff. Motion for new trial was filed in due time, overruled, and exceptions saved, and judgment pronounced on the verdict, and the case is brought here for review.

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IRWIN, J.: The first assignment of error urged by plaintiff in error for a reversal of this case is that special findings numbers 2 and 4 are not supported by any evidence in this case. Special finding No. 2 is: "Was the car on which plaintiff was riding operated at a dangerous rate of speed at or about the time of the accident?" Answer: "Yes." Special finding No. 4. is: "Was there any more swaying or jarring of the car at or about the time of plaintiff's injury than was incident to operating the same in the usual or ordinary manner on approaching the curve near 17th street?" Answer: "Yes." But it is contended by plaintiff in error that there is no evidence tending to support either one of these findings. Under the well-recognized rule of this court, if an examination of the record does show that there is evidence which reasonably tends to support the findings of the jury, the same will not be disturbed on a question of fact. At page 10 of the record, in the testimony of the plaintiff Martin, he testifies that after passing 16th street, he rang the bell giving the signal to the motorman to stop at the next stopping place. He then, on approaching 17th street, went out on the platform and told the conductor he wanted off. The conductor gave the motorman the signal to stop. He testified the place where he asked to be allowed to get off was where he had often been permitted to get off the car. He testified that the car did not stop at the usual place, 17th street, but ran by at full speed, and that the place where he was thrown from the car was on a curve and that the stopping place was on a curve. The witness Davis, at page 67 of the record, testified that the car was going at about the usual rate of speed. Now, we think a fair inference to be drawn from the testimony of Davis that they were going about the usual rate of speed would mean the usual rate of speed between stopping places, and not mean the usual rate of speed on approaching a stopping place, particularly where that stopping place was on a curve. Now, we think it will not be seriously contended that if

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this car, at the time of the accident, was approaching a stopping place, and was on a curve, and was running at full speed, as testified to by Martin, this would not be negligence on the part of the company. As against this proposition and the testimony of Martin and Davis, is the testimony of the motorman and conductor in charge of the car. Now, it was the province of the jury to determine from this evidence, which was conflicting and contradictory, as to where the burden of proof was. They had a right to take into consideration, and no doubt did take into consideration, the appearance and demeanor of the witnesses on the stand, their interest in the result of the suit, and from all the circumstances surrounding the testimony, determine on which side was the burden of proof. They had a right to take into consideration, and no doubt did, the fact that if this car was run in a negligent manner, and injury was the result of negligence, it was the negligence of either the motorman or conductor, and with this conflict of testimony before the jury, we are not prepared to say there was no evidence which reasonably tends to support the finding of the jury.

We have, in addition to the testimony of these two witnesses, Martin and Davis, other physical facts developed by the evidence which tend to corroborate Martin as to the rate of speed at which the car was running. Martin testified (record, page 14) that he was dragged not less than thirty yards from where he first fell from the car to where he was jerked loose from it and where he lay until he was picked up unconscious. Livingston swears (record, page 26) that it was from 40 to 50 yards from where he was lying to where the car was finally brought to a stop. Davis swears (record, page 67) that it was from 40 to 50 yards from where plaintiff was found on the ground to where the car was brought to a full stop. Now, if we add this distance to 30 yards, the distance Martin was dragged before he was jerked loose from the car, it would make 70 or 80 yards from the time he was thrown from the car until the car came to a full stop. The testimony

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of Colt, who testified that he had formerly been conductor on defendant company's cars, and was familiar with the running of cars, was that from 20 to 25 yards from the time the motorman got the signal would be sufficient distance to stop the car, if running at the ordinary rate of speed. Then he was asked this question on cross-examination, by counsel for plaintiff in error: "Suppose you are not slowing up, suppose you are running on schedule, like that University line for which the time is twelve miles an hour?" Answer: "Well, I think a man could stop a car in 25 yards." Now, if this testimony is reliable, and the motorman could stop a car running at the rate of 12 miles an hour in the distance of 25 yards from the time he got the signal, then we think it is some evidence which the jury had a right to consider as to the rate of speed that this car was traveling when it was not stopped in less than 60 to 80 yards after the man was thrown from the car, because the testimony of the conductor is that he saw him when he jumped or was thrown from the car, or as plaintiff said, "jerked from the car," and the presumption is that he would stop the car as soon as possible. It seems to us this was a circumstance that would warrant the jury in finding that the car at the time of the accident was being operated at an unusual and dangerous rate of speed.

Now, as to the fourth special finding, that there was more swaying or jarring of the car at the time the plaintiff was injured than was incident to operating the car in the usual or ordinary manner, while there is possibly no satisfactory and direct testimony as to this proposition, we think that the jury had a right, from their common knowledge and experience as men, to find that, where a car was run at a high and dangerous rate of speed around a curve, there would be more swaying and jarring of the car than would occur if the car was operated in the usual and ordinary manner, and with usual and ordinary care.

The second assignment of error is: The special findings are inconsistent with the general verdict under the court's instructions.

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We have examined the record carefully, and are unable to say that this assignment of error is tenable. In fact, we think it is not borne out by the record. It is true, counsel for plaintiff in error indulge in what seems to us a fine spun theory, under which theory it might be presumed there was a certain inconsistency between the general verdict of the jury and certain special findings. They do this by limiting and fixing the place of the accident at a few feet south of the usual stopping place of the car, and insist that, because the evidence does not show the injury occurred at the exact and precise point of stopping, it is inconsistent with the instructions of the court on this proposition. We think the court's instructions clearly and correctly define the law governing this class of cases, and the testimony of the plaintiff, if believed by the jury, would establish a case of negligence against the company, as his testimony was that he took his position on the platform, after the signal had been given to stop, and while they were approaching the stopping place, with the thought in his mind that they would stop at the usual place of stopping after they had been signaled to stop and after he had notified the conductor that he wanted to get off, but that they ran by the usual stopping place at a full speed, and that it was in consequence of the speed of the car going around the curve at or near the stopping place and the jarring of the car that threw him from the car; that he grabbed at the railing to save himself, and was dragged some distance by the car, and thus sustained his injury. This, it is true, is disputed by the conductor, who testifies that in place of being thrown from the car he voluntarily jumped from the car after he had been warned not to do so. This statement of the conductor is expressly denied by the plaintiff, and it was clearly a question of fact which was the sole province of the jury to determine. They have determined that fact in favor of the plaintiff. The instructions of the court clearly and distinctly informed the jury, that before the plaintiff could recover, the jury must believe from all the circumstances, and all the evidence

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showing his station on the car, that he was using reasonable care and caution to avoid injury. They were expressly instructed that if the jury believed from the evidence showing his situation on the car that he was negligent, and that the negligence contributed to his injury, he could not recover. They were also expressly instructed that, if a recovery was had against the company, it must be upon evidence showing the negligence of the company. On the whole, we think the instructions of the court were fully as liberal to the defendant as the law would warrant, or the defendant had a right to expect.

Having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, at the costs of the plaintiff in error.

Burwell, J., who presided in the court below, not sitting; Pancoast, J., absent; all the other Justices concurring.

FRED W. RHODES v. CHARLES M. ARTHUR.

(Filed October 12, 1907.)

(92 Pac. 244.)

VENDOR AND VENDEE—Fraud of Vendee—Worthless Securities—Rights of Vendor. A vendor of real estate, who sells at an agreed price and accepts real estate in satisfaction of a portion of the purchase price and is induced by the fraud of the vendee to accept a worthless note and mortgage in payment of the balance of the purchase money, may, upon discovering the fraud, return or tender back the note and mortgage and recover the unpaid purchase money and have a vendor's lien for the amount so recovered.

(Syllabus by the Court.)

Error from the District Court of Pottawatomie County; before B. F. Burwell, Trial Judge.

Affirmed.

Blakeney & Maxey and J. W. Bartholomew, for plaintiff in error.

W. M. Engart and Cassidy & Cassidy, for defendant in error.

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BURFORD, C. J.: The defendant in error, Charles M. Arthur, was the owner of a tract of land in Pottawatomie county, Oklahoma, which he sold to the plaintiff in error, Fred W. Rhodes, for the agreed price of \$1,250, and took in payment therefor certain lots at the agreed price \$600 and a certain note and mortgage held by Rhodes for the balance of the purchase money. This note was for the sum of \$1,150, secured by a deed of trust executed by John Myers upon certain real estate in the state of Missouri, and upon which a payment of \$500 had been made. This action is one by Arthur to recover the \$650 balance of purchase money for the land by him conveyed to Rhodes, and to have a vendor's lien declared against said land. He alleges that he sold the land to Rhodes for the agreed price of \$1,250, and received upon said purchase price the sum of \$600, and conveyed the land to Rhodes. that, relying upon certain false and fraudulent representations of Rhodes as to the validity and value of the note and trust deed, he agreed to accept said note and trust deed for the balance of the purchase money, \$650; that Rhodes represented to him that the maker of the trust deed was the owner of the land upon which it was executed, and had a right to give the same, that it was "gilt edge" and would be paid when due; that he had never seen the Missouri land; that he did not know Myers and was unable to find him, and that he relied upon the representations of Rhodes and accepted said note and trust deed believing the note good for the amount due thereon; that said representations were false; that Myers had no title to the Missouri land; that said trust deed was worthless and of no value; and that he believed Myers to be insolvent. He tendered back the note and trust deed, and demanded the \$650, and, upon refusal, sued to recover the unpaid purchase money and to have the same declared a lien upon the land conveyed by him to Rhodes.

Rhodes filed his answer, in which he denied the allegations of fraud and false representations, but admitted "that the plaintiff

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did on or about the 14th day of August, 1901, sell and convey to this defendant, Fred W. Rhodes, the land and premises described in paragraph one of said petition for the agreed price of twelve hundred dollars, and that in part payment of said consideration the defendant Rhodes endorsed, without recourse, and delivered to the plaintiff, a note and mortgage, on which there was a balance due of six hundred and fifty dollars, in payment of six hundred fifty dollars of said consideration, and that the balance, six hundred dollars, of which consideration defendant Rhodes conveyed to plaintiff property which said plaintiff took at an agreed price of \$600."

These pleadings fix the character and status of the case. Persons are bound by the admissions set out in their pleadings, and, as a general rule, are concluded by them. The plaintiff avers that he sold Rhodes the land for a money consideration, and took lots in part pay, and accepted the note and trust deed at an agreed price of \$650 for the balance. The defendant admits that he bought the land at an agreed price of \$1,250; that he conveyed property in payment of \$600 of the purchase money, and endorsed the note, without recourse, in payment of the remaining \$650. Counsel for plaintiff in error have presented an elaborate and logical argument as to the theory of these pleadings, based both upon the pleadings and the testimony, and ask the court to determine whether this is an action to rescind a contract for fraud, or one to affirm the contract and recover damages for breach, and the law as to each of these classes of cases is correctly stated in their brief. But, in view of the issue specifically made by the pleadings, we are not called upon to enter into any extended discussion of theories. The case, in our judgment, falls within the exception stated in *Graham v. Moffett et al.*, 109 Mich. 303, 78 N. W. 132, which is cited in the brief of plaintiff in error, viz: "There is a class of cases, however, in which the vendor's lien does exist, viz., where the contract obligates the vendee to pay a given sum for the land, and the vendor is afterwards induced by fraud to

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accept a chattel for the whole or a definitely fixed portion of such purchase price. In such a case, the vendee might tender back the chattel and endorse a lien for the amount represented by it. This is upon the theory that a pre-existing contract, its fraudulent modification being rescinded, the contract itself is left to stand, with its attendant right of lien in the vendor." And this doctrine is well supported by authority.

In 2 Warvelle on Vendors (2nd Ed.) sec. 692, it is said: "Upon the principle that the vendor has in all cases an equitable lien upon the estate sold for the unpaid purchase money as between himself and the vendee, unless there is either an express or implied agreement to waive such lien, it has been held that where, by the fraud of the vendee, a part of the price of the lands sold in fact remains unpaid, although the vendor supposed he had been paid in full, a lien may be asserted for such unpaid portion. Thus, if upon the sale of land the purchaser should pay part of the purchase money in lawful coin and part in worthless bills from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectible, the vendor would have a right to charge the land itself with that part of the purchase money which actually remained unpaid, as an equitable lien upon such land. So, also, if the vendor agrees to receive in part payment other lands, with the value of which he is unacquainted, and the vendee thereupon makes false representations as to the character, situation, and value of such land so to be given in exchange, whereby the vendor is induced to allow for the same a sum greatly beyond its value, he would be entitled to an equitable lien upon the land sold by him for the amount of the difference in value between the land taken in part payment as it really was and the value as it would have been had the vendee's representations been true. So, too, where a party sold land and received a part of the consideration in money and for the balance was induced to accept notes and mortgages which were worthless, and which the purchaser knew to be so at the time of the

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sale, it was held that this constituted a fraud on the vendor, and did not defeat his lien for the purchase money, and this although the vendor, on discovering the worthless character of the notes and mortgages, returned them and received others in their place equally worthless, to the knowledge of the purchaser; as the practicing of a second fraud by the purchaser would not relieve him from the consequence of the former one perpetrated by him. And so generally, if the vendee in bad faith acquires the legal title, and by imposition or fraudulent artifices evades payment or pays or offers to pay in worthless commodities, or fraudulently substitutes a different medium of payment from that agreed upon, the vendor's lien will be preserved against the land in the hands of the vendee, a purchaser from him with notice, or a volunteer." As sustaining this rule, see *Gee v. McMillan*, 14 Ore 268, 12 Pac. 417; *Tobey v. McAllister*, 9 Wis. 463; *Brown v. Byam et al.*, 65 Iowa, 374; *Huff v. Olmstead*, 67 Iowa, 598; *Bokes v. Gilbert*, 93 Ind. 70; *Gilbert v. Bokes et al.*, 106 Ind. 558; *Fouch et al. v. Wilson*, 60 Ind. 64; *Williamson v. Worten* (Ind.) 31 N. E. 791; *Graham v. Moffett et al.* (Mich.) 78 N. W. 132; *McDole v. Purdy*, 23 Iowa, 277; *Yoemans v. Bell*, 29 N. Y. Supp. 502; *Franklin v. Walker et al.* (Ill.) 49 N. E. 556; *Jones et al v. Wolf et al.* (Tenn.) 42 S. W. 216.

We have examined all the alleged errors referred to by plaintiff in error, and we find no error in the record. The petition stated a cause of action; there was no improper joinder of causes of action; there was sufficient proof to warrant the court in overruling the demurrer to the evidence. Upon the verdict of the jury, the vendor was entitled to a lien for the unpaid purchase money, and it was the duty of the court to declare the lien and decree its foreclosure.

We find no error in the record. The judgment is affirmed, at the costs of the plaintiff in error.

Burwell, J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

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S. R. WAGG v. MARY B. HERBERT *et al.*

(Filed October 12, 1907.)

(92 Pac. 250.)

1. **MORTGAGES—Absolute Deed as Mortgage—Extraneous Evidence.** When the question before a court of equity is whether a deed which purports upon its face to be an absolute deed was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage.
2. **SAME—Substance and Effect of Instrument.** Where a transaction was in substance and effect a loan of money upon the security of a farm, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it and declare the conveyance of the land to be a mortgage.
3. **SAME—Fraud and Undue Influence.** A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no undue influence or unconscionable advantage has been taken of his position by the mortgagee; but to insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.
4. **SAME.** Where a mortgagee purchases the premises of the mortgagor, and the evidence discloses that fraud was committed and undue influence was used, and where the transaction shows that it was unfair and an unconscionable advantage has been taken by virtue of the position of the mortgagee, a court of equity will decree a deed, which is absolute on its face, to be a mortgage.
5. **SAME.** A sale of property to a mortgagee is to be scrutinized to see whether any undue advantage has been taken of the mortgagor, and especially is this necessary when the mortgagee in the inception and throughout the whole conduct of the business has shown himself ready and skillful to take advantage of the necessities of the borrower.
6. **SAME—Adequacy of Consideration.** In determining the question whether the transaction was a sale or a mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale.
7. **SAME—Laches—Acquiescence.** Under the circumstances of this case, the plaintiff was not guilty of such laches or acquiescence

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as would preclude her from asserting her equitable rights under the well-settled principles of equity jurisprudence.

(Syllabus by the Court.)

Error from the District Court of Pawnee County; before Jno. H. Burford, Trial Judge.

Affirmed.

Biddison & Eagleton, for plaintiff in error.

E. M. Clark and Wrightsman & Diggs, for defendant in error.

STATEMENT OF CASE.

This was a suit in equity commenced in the district court of Pawnee county, Oklahoma, on June 13, 1903, by W. H. Herbert and Mary B. Herbert against S. R. Wagg and 47 other defendants, the object and prayer of which was to cancel a deed, absolute on its face, executed by Mary B. Herbert to S. R. Wagg on May 28, 1901, and for other equitable relief, on the ground that it was obtained through fraud, oppression, and undue influence, as alleged in the plaintiffs' amended petition. In order that the issues may be clearly and fully understood in this case, we think it proper to set out the facts fully as pleaded in the amended petition and in the answer thereto by the defendant Wagg. The second amended petition, upon which this case was tried, is as follows:

"Comes now the above-named plaintiff, and, having first obtained leave of the court, files this her second amended petition and for her cause of action against the defendants herein alleges:

"That the above-named plaintiff is and at all times mentioned herein was the owner of and residing upon the west one-half of the southeast quarter of section eight, township twenty-one north, of range eight east of the I. M., in Pawnee county, Oklahoma Territory; and has so resided with her husband until his decease, and with her two minor children at all times since the title thereto was acquired under the homestead laws of the United States as a home, and claiming the same as a home under and by virtue of the laws of the United States and of the homestead laws of the territory of Oklahoma.

"That upon the 26th day of October, 1898, the above-named plaintiff with her husband, W. H. Herbert, who is now deceased,

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borrowed from the above-named defendant, S. R. Wagg, \$900.00 and executed therefor a certain promissory note in the sum of \$1,000.00, a copy of which is hereto attached marked 'Exhibit A' and made a part hereof. And to secure the payment of said note to the said S. R. Wagg, executed their certain mortgage upon the real estate above described, a copy of which is attached hereto marked 'Exhibit B' and made a part hereof. And as further security for the payment of said indebtedness signed their certain instrument in the form of a warranty deed, a copy of which is hereto attached marked 'Exhibit C' and made a part hereof, and placed said 'Exhibit C' in the Bank of Cleveland, to be by it held in accordance with the terms expressed in a certain writing, delivered by said defendant S. R. Wagg to this plaintiff and her said husband, as an inducement for the signing of said 'Exhibit C' and containing the terms and conditions under which the said 'Exhibit C' was signed and the conditions under which it should be delivered to the said defendant, S. R. Wagg, a copy of which is hereto attached marked 'Exhibit D' and made a part hereof.

"That in the taking possession of said 'Exhibit D' and said real estate, and in the negotiations looking to the redemption of said real estate from the said mortgage as embraced in all of said Exhibits A, B, C, and D, all as herein alleged: the said Leory M. Brown acted with, for and in behalf of the said defendant S. R. Wagg as his agent with full authority as such agent, and did in his capacity as such agent help, aid, and abet the said S. R. Wagg in the doing of the various things herein alleged to have been wrongfully done by the said S. R. Wagg.

"This plaintiff further alleges that on or about the 26th day of December, 1899, without the knowledge or consent of either this plaintiff or her husband, and in violation of the conditions expressed in said 'Exhibit D,' and to defraud and wrong this plaintiff and her said husband, and in violation of their rights in the premises, and in violation of the duties of said S. R. Wagg in the premises under the relationship existing between this said plaintiff and her husband and the said S. R. Wagg, the said S. R. Wagg did obtain possession of the said 'Exhibit C' and on December 26, 1899, did cause the same to be placed of record in the office of the register of deeds in and for Pawnee county, Oklahoma Territory, and recorded in book one of deeds at page 329; and thereby in particular did violate the conditions expressed in 'Exhibit D' in

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this, to-wit: That the said deed was not under any circumstances to be delivered to the said S. R. Wagg until two years and a half after the date thereof. Which time had not expired at the time of the taking of the same by the said S. R. Wagg. And thereby in particular did violate the rights of this plaintiff in this: That the said deed and said 'Exhibit D' were but parts of the mortgage transaction and conveyed no title. And that the said S. R. Wagg obtained possession of the same for the unlawful purpose of, and did use the same for the unlawful purpose of setting up and claiming title thereunder adverse to this said plaintiff and her said husband, and did take possession by force and fraud of said real estate as herein alleged, and did thereby oppress this plaintiff and by said means fraudulently, wrongfully, and by the use of said undue advantage, and the taking advantage of the conditions of this plaintiff, and of the position which he occupied by reason of the relations existing as hereinbefore alleged at a time when this plaintiff was financially embarrassed by reason of the facts herein alleged; and by reason of the financial embarrassment of this plaintiff, and in pursuance of the advantage of said S. R. Wagg and the disadvantage of this plaintiff, said S. R. Wagg did in the month of February, 1900, notify this plaintiff and her said husband that the said deed was recorded, and that this plaintiff and her said husband no longer owned said land, and that at all times thereafter did persistently, wrongfully, and continually claim to this plaintiff and her said husband, and to the public, that he the said S. R. Wagg was the absolute owner of said real estate without the right of redemption being in this plaintiff and her said husband. And in furtherance thereof, the said S. R. Wagg did on or about the 14th day of May, 1900, come to the said premises and take possession by force, and over the objection and protest of this plaintiff, and in the absence of her said husband, of the major portion of said premises, and thereby deprived this said plaintiff and her family of the enjoyment thereof, the means of livelihood, and of complying with the contracts referred to as exhibits herein; which could and would have been done with the rents and profits thereof.

"And upon this plaintiff soliciting permission to redeem from said mortgage, the said S. R. Wagg refused to accept from this plaintiff the amount due upon the said note and mortgage, and attempted to exact from this plaintiff the sum of \$400.00 in ex-

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cess of what was due on said mortgage according to the terms thereof, and before the time when said S. R. Wagg would have been authorized to take possession of said 'Exhibit E.' And in furtherance of his said design to wrong and defraud, the said S. R. Wagg refused to accept even the said excess of \$400.00, under the fraudulent, wrongful and oppressive and unjust claim of him the said S. R. Wagg being the absolute owner thereof, and by reason of the said fraud, oppression and over-persuasion, undue influence and taking advantage of his position and the relationship of parties as herein set forth, and the disadvantage under which this plaintiff was placed by reason of the acts herein complained of, the said S. R. Wagg, for a grossly inadequate consideration, procured from this plaintiff, who was at the time inexperienced in transacting business, and during the absence of her said husband, a purported warranty deed to all of said real estate, a copy of which deed is hereto attached, marked 'Exhibit E' and made a part hereof. As a consideration therefor, the said S. R. Wagg did give a deed to this plaintiff to twenty-five acres of said real estate, which was at the time this plaintiff's own property, a copy of which deed is hereto attached, marked 'Exhibit F', and made a part hereof.

"That the only consideration received by this plaintiff for the said purported deed marked 'Exhibit E' was a relinquishment of the said mortgage herein referred to as 'Exhibit B,' and ever since which time the said defendant S. R. Wagg and his assigns have retained and held the possession to the north 55 acres of said real estate, which is not included in 'Exhibit F', the same being, substantially the same portion of said real estate which said S. R. Wagg by force and violence took and at all time thereafter has held from the possession of this plaintiff as hereinbefore alleged. on or about the 14th day of May, 1900, and since which time the said S. R. Wagg has had, received, and retained the rents and profits thereof. And for the purpose of further clouding said transaction had said 'Exhibit C' again recorded on May 6, 1901. in book one, page 581, in the office of the register of deeds of said county.

"That the said real estate was at the time of the giving of said 'Exhibit E' of the fair and reasonable value of \$100.00 per acre. And that had it not been for the misconduct, wrongs, oppression, fraud, deceit, undue influence, over persuasion, and the

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advantage of the position occupied by reason of the relationship of parties as herein set forth, and by reason of the financial depressed condition of this plaintiff by reason thereof, the said deed referred to herein as 'Exhibit E' would never have been executed.

"This plaintiff further alleges that the defendants herein are by reason of the wrongs herein set forth, now in the actual possession of all of said eighty acres of land excepting the twenty-five acres referred to in said 'Exhibit F.' This plaintiff further alleges that she has an equitable estate in all of said eighty acres, and is in equity the owner thereof, subject to the rights of said S. R. Wagg as mortgagee, and is entitled to the immediate possession thereof, and that the defendants unlawfully keep this plaintiff out of the possession of the north fifty-five acres thereof, not included in said 'Exhibit F.'

"That this plaintiff hereby tenders and brings into court for the use and benefit of said defendants herein the full consideration represented by the said note and mortgage together with the interest and taxes according to the terms thereof, and stands ready and willing to pay the same on the order of the court.

"Plaintiff further alleges that on the 14th day of May, 1900, the defendant S. R. Wagg took possession of all of said eighty acres of land excepting the house occupied by plaintiff and a small piece of ground upon which said house was located and the curtailages thereof, and that the defendant has held, kept, and caused to be kept from this plaintiff the possession of said tract of land from that time until the present, and that the value of the use and occupation of said land so held by the said defendant and retained from plaintiff has been and is the sum of \$800.00.

"Plaintiff further alleges that subsequent to the delivery by the plaintiff to the defendant S. R. Wagg of the deed of which 'Exhibit E' is a copy, the defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embraced in said 'Exhibit E', platting the same into lots, blocks, streets, and alleys for town-site purposes, and named the said plat 'Wagg's Addition to the Town of Cleveland, Pawnee County, Oklahoma Territory,' and did subsequently and before this action was brought proceed to sell some of said lots to innocent purchasers, the exact lots and amounts received for which are not known to the plaintiff, but which amounts to a large sum of money. And plaintiff alleges that the defendant S. R. Wagg has not accounted to the plaintiff for said

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moneys, but has converted the same to his own use; and that an accounting is necessary between the said plaintiff and defendant to determine the amount which the said defendant has so unlawfully received and converted to his own use.

"That the defendants herein other than the said S. R. Wagg claim to have some interest in the real estate involved herein adverse to this plaintiff, the exact nature of which is unknown to this plaintiff, but that the same is subordinate and inferior to the rights of this plaintiff herein.

"Wherefore plaintiff prays judgment that the said deed referred to as 'Exhibit E' be canceled and held for naught; and that it be adjudged and decreed by this court that the deed referred to as 'Exhibit C' be held to be a part and parcel of the said mortgage 'Exhibit B'. And that the court determine the amount due as principal and interest on said mortgage from the plaintiff to the defendant. And that the court proceed to determine the amount in crops, produce, rents, use and occupation which the said S. R. Wagg, defendant herein, has taken or caused to be taken from this plaintiff and from said eighty acres of land or any part thereof; and that the same be charged to said S. R. Wagg and credited to this plaintiff.

"And that the court, after the trial of the issues between this plaintiff and the other defendants herein, also take an accounting and determine the amount of money which the said S. R. Wagg has received or should have received in money, notes, and property for the sale or trade of lots to innocent purchasers without notice of the rights of this plaintiff after the same shall have been determined by this court under the issues formed or to be formed between plaintiff and defendants herein, upon the portion platted by him of the said eighty acres; that is to say, of the fifty-five acres of land; and that the same be charged to the said S. R. Wagg, defendant herein, and, after the defendant S. R. Wagg is given credit for the balance due on said note and mortgage and taxes, that this plaintiff be given judgment against the said S. R. Wagg for the balance due this plaintiff on said account.

"And this plaintiff further prays judgment that she be restored to the possession of all the remainder of said land, and that the defendant S. R. Wagg and all persons holding by, through, or under him and against all the defendants herein and their alleged transferees, excepting such as shall by this court be de-

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creed to be innocent purchasers thereof in good faith and for a good and sufficient consideration. And that all other claims or pretended claims by any of the defendants herein be barred and held for naught; and that this plaintiff be granted such other and further relief as the court may deem legal and just; and that this plaintiff recover her costs in this action."

'Exhibit A', which is made a part of the amended petition, is as follows:

"\$1,000.00.

Cleveland, O. T., Oct. 24, 1898.

"Five years without grace, after date, for value received, we as principals promise to pay to the order of S. R. Wagg, one thousand and no-100 Dollars, at the Bank of Cleveland, and interest thereon at the rate of ten per cent. per annum from October 21, 1899, payable annually in advance and if not paid when due to bear 10 per cent. interest from date. The makers and endorsers severally waive presentment of this note for payment, and protest, and notice of non-payment, and agree that the time for payment of this note may be extended from time to time without notice and that no such extension shall impair or change the liability of any of these parties hereto. If suit be instituted we agree that judgment be rendered for ten per cent., additional as attorney's fees.

"[Signed] MARY B. HERBERT,
"W. H. HERBERT."

...

'Exhibit B' reads as follows:

"No. 1793. Mortgage from W. H. Herbert and Mary B. Herbert to S. R. Wagg.

"Know all men, that on this 24th day of October, 1898, Mary B. Herbert and W. H. Herbert, husband and wife, both of Cleveland, O. T., parties of the first part, in consideration of (\$1,000.00) one thousand dollars, in hand paid by S. R. Wagg, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said party of the second part, his heirs and assigns forever, the following real estate lying and being in the county of Pawnee, and territory of Oklahoma, and known and described as follows to-wit: The same being the west half of the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), in township twenty-one (21) north, of range eight (8) east of the Indian Meridian, the same being eighty acres of land adjacent to

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and adjoining the town of Cleveland, O. T. For further description the farm is bounded on the north by Joe Box's farm, on the east by the town of Cleveland, on the south by the Lowry claim, and on the west of C. J. Phenix farm.

"Appraisement is hereby waived in any foreclosure proceeding together with all the privileges and appurtenances to the same belonging.

"To have and to hold the same to the said party of the second part his heirs and assigns forever, and the said Mary B. Herbert and W. H. Herbert, husband and wife, party of the first part, hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority to convey the same, and the title so conveyed is clear, free and unincumbered, and that they will warrant and forever defend the same, to the party of the second part, his heirs and assigns against all claims whatsoever.

"Provided always, and these presents are upon this express condition that if the said party of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the party of the second part, his heirs, executors, administrators or assigns, the just and full sum of one thousand dollars (\$1,000.00) five years from date hereof, with interest thereon from October 21, 1898, until paid at the rate of ten per cent. per annum, the same to be paid annually in advance, and if the interest is not paid when due the same is to bear interest the same as the principal, according to the provisions of one promissory note, bearing even date herewith, executed by the said Mary B. Herbert and W. H. Herbert, husband and wife, parties of the first part to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said real estate and shall deliver or exhibit receipts therefor to the party of the second part, his heirs and assigns on or before the first day of May next after such taxes shall have become due and payable; and shall insure and keep insured the buildings thereon against loss by fire in the sum of two hundred dollars or over, in insurance companies to be approved by party of the second part, his heirs or assigns, and the policy or policies of such insurance assigned as collateral thereto, and on the default thereof it shall be lawful for the said party of the second part his heirs or assigns to effect the

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insurances and the premium and premiums and other legal expenses, fees, costs, and charges paid for the effecting of the same, together with interest thereon at the rate of ten per cent. per annum, shall be a lien upon the said mortgaged premises, added to the amount of the said one thousand dollars and secured by these presents until the payment of said promissory note, then these presents shall be null and void. But in the case of non-payment of any sum of money (either of principal, interest, or taxes) at the time or times when the same shall become due, or to insure and keep the policies assigned agreeably to the conditions of these presents or of the aforesaid note or of any part thereof, or in case of such failure to deliver such receipts, as above provided, or in case of failure on the part of said party of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in such case the whole amount of said principal sum shall at the option of the said party of the second part, his representatives or assigns, be deemed to have become due and the same, with interest thereon at the rate aforesaid be collectible in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum shall have been made payable at the time when such failure shall occur as aforesaid; and it shall be lawful in such, for said party of the second part, his heirs, executors, administrators or assigns, to grant, sell and convey said real estate with the appurtenances thereunto belonging, at public auction on vendue, and on such sale, to make and execute to the purchaser or purchasers his, her or their assigns forever, good and sufficient deed of conveyance in the law pursuant to the statutes in such cases made and provided; and out of the moneys raised from such sale to retain the principal and interest which shall then be due on the said promissory note together with the costs and charges, rendering the surplus moneys, if any there be, to the said party of the first part, their heirs or administrators, after deducting the costs of such vendue as aforesaid, and in the case of the foreclosure of this mortgage, the said party of the first part for themselves, their representatives or assigns, do covenant and agree that they will pay the said party of the second part, his representatives or assigns in addition to the taxable costs, in the foreclosure suit, sixty dollars as solicitor's fees.

"In witness whereof the party of the first part have hereunto set their hand and seals this 24th day of October, A. D. 1898.

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"Signed, sealed and delivered in the presence of W. T. Litton and G. W. Sutton.

"MARY B. HERBERT,

"W. H. HERBERT.

"Territory of Oklahoma, Pawnee County, ss:

"On this 26th day of October, A. D. 1898, personally came before me Mary B. Herbert and W. H. Herbert, known to me to be husband and wife, and to me known to be persons who executed the foregoing mortgage upon land known to be the homestead of the grantors, and acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

"[Seal]

W. T. LITTON, Notary Public.

"My commission expires Jan. 30, 1899.

"Territory of Oklahoma, County of Pawnee, ss.:

"Received for record this 14th day of November, A. D. 1898 at 8:05 P. M. and recorded in vol. (1) of mortgages in page 173 Fee \$1.55

"[Seal]

J. J. CORBUT, Register of Deeds.

"The original of this mortgage was accompanied by a plat of the land.

"J. J. CORBUT, Register of Deeds."

"Exhibit C" is as follows:

"This deed is left in the bank of Cleveland in escrow as security of a note and mtg., given by Mary B. Herbert to S. R. Wagg of Appleton, Wis. W. T. Litton, Csh.

"Know all men by these presents that we, Mary B. Herbert, and her husband, W. H. Herbert, for and in consideration of the sum of one thousand (\$1000.00) dollars do hereby sell and convey to S. R. Wagg, the following real property situated in Pawnee county, southeast quarter of section eight (8), township twenty-one (21) north, of range eight (8) east of the I. M., more particularly described and bounded as follows, to-wit: On the north by the Joe Box place, on the east by the town of Cleveland, on the south by the Lowery place, and on the west by the C. J. Phenix place, with all its appurtenances and warrant the title to same.

"Signed and delivered this the 24th day of Nov. 1898.

"MARY B. HERBERT,

"W. H. HERBERT.

"Territory of Oklahoma, Pawnee County, ss:

"Before me, W. T. Litton, notary public in and for the above

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named county and territory, on the 24th day of October, 1898, personally appeared Mary B. Herbert and husband and executed the above conveyance of land, to me known to be the homestead of the grantors and each for themselves acknowledged the execution thereof to be their free and voluntary act for the purposes named.

"Witness my hand and official seal the date above written.

"[Seal]

W. L. LITTON, Notary.

"My commission expires Jan. 30, 1899.

"This deed is given to be held in escrow as additional security to grantee for a loan of \$1000.00 this day loaned to the grantors and for which they have this day given the grantee a mortgage on the same land.

"Territory of Oklahoma,

"Pawnee County, Canceled

"Fee \$1.00.

"This instrument was filed 26th day of December, 1899 at 8 A. M. and duly recorded in book 1 of Deeds, page 329.

"T. M. BROADBUSH."

"Exhibit D" is as follows:

"September 25, 1898.

"W. H. Herbert, Cleveland, Oklahoma.

"My dear Sir:

"Yours of the 15th to hand and it's satisfactory as a fair declaration to do and I have begun to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you describe, & I would not. I have been made to hesitate on acc't of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit & call it off. You execute a warrantee deed to me to be placed in escrow, and held by the bank of Cleveland or A. A. Drown, in trust, for the fulfillment of the terms of the mortgage. In case you fail to fulfill the terms and are in default of interest or other terms for six months then the deed is to be delivered to me or my order. The mortgage is for \$1000.00. I will deduct the first year's interest \$100.00, send \$900.00 to the bank with instructions. This pays first year's interest, second year's interest is not due until the end of the second year and six months grace on the end of this makes a full 2½ yrs. before you

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allow or I can ask for the deed in case of default of contract. I do this solely in the interest of protecting myself against injunctive and interference proceedings from interlopers and blackmailers—in case such an unpleasant thing as foreclosure proceedings should ever be necessary. I do not expect such a thing to occur if I did no loan would be made, but I am now looking to the extreme of the case and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowing distress a man, & am not inclined that way, but want contracts lived up to. The papers you executed have not arrived here as yet to my knowledge. They will be all right when complete and I have examined them and all that will be necessary to execute the deed in connection with them and place them in hands of trustee as indicated above and for the purposes named. I trust this will meet your needs. On execution of papers you can have money. I shall be absent from home for ten days.

“Yours,

“S. R. WAGG.”

To this amended petition the defendant, S. R. Wagg, filed the following answer:

“First: Answering plaintiffs second amended petition herein, the defendant S. R. Wagg denies each and every material allegation therein, which is not herein explicitly admitted.

“Second. This defendant admits the execution of each of the written instruments copies of which are attached to said second amended petition, and marked respectively Exhibit A, B, C, D, and E, but this defendant denies that said ‘Exhibit D’ contains the terms and conditions of the escrow of the deed marked ‘Exhibit C’ and further denies that either of the endorsements as to the purpose of the execution of ‘Exhibit C’ were endorsed thereon at the time of the execution thereof or that they form any part of said instrument.

“Third. This defendant specially denies all that allegation of said second amended petition, which reads as follows: ‘That in the taking possession of said ‘Exhibit D’ and the said real estate in the negotiations looking to the redemption of said real estate from the said mortgage as embraced in all of said exhibits A, B, C, and D, all as herein alleged; that said Leroy M. Drown, acted with, for and in behalf of the said defendant S. R. Wagg, as his agent

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with full authority as such agent, and did in his capacity as such agent help, aid, and abet the said S. R. Wagg in the doing of various things herein alleged to have been wrongfully done by the said S. R. Wagg.'

"Fourth. This defendant admits that subsequent to the delivery by the plaintiff to the defendant S. R. Wagg, of the deed of which 'Exhibit E' is a copy, the defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embraced in said 'Exhibit E' platting the same into lots, blocks, streets, and alleys for townsite purposes, and named said plat 'Wagg's Addition to the Town of Cleveland, Pawnee County, Oklahoma Territory,' and did subsequently and before this action was brought, proceed to sell some of these lots to innocent purchasers.

"(2) For a further and second defense to plaintiff's second amended petition, this defendant alleges that all the admissions and denials of the first court are true, and they are hereby referred to and made a part of this defense as though herein fully set out.

"This defendant further alleges: That at the time he demanded and took from escrow the warranty deed, a copy whereof is attached to plaintiff's petition, marked 'Exhibit C,' the said plaintiff and her husband W. H. Herbert, were in default of payment of the interest upon the loan secured by the mortgage, a copy whereof is attached to plaintiff's petition marked 'Exhibit B' in the sum of one hundred dollars, and in addition thereto were in default of the payment of taxes for the year 1898, and the land had been advertised for sale for the taxes of 1898, and this defendant had been obliged to pay said taxes in the sum of \$24.94 and accrued penalty and costs thereon in the sum of \$3.86 in order to protect his aforesaid mortgage, and the said plaintiffs were wholly unable and unwilling to refund and repay said taxes and penalty or to pay said interest. That for these reasons the said defendant S. R. Wagg took the said deed from escrow and filed the same for record as an additional security for said loan and additional advances, and after placing said deed of record this defendant advised the said plaintiffs that they might still redeem the said lands from the said deed and mortgage, and repeatedly requested them to do so, and advised them by letter and otherwise that they might redeem said lands and that he would be willing to accept the payment of interest and additional advances and carry the loan according to its original terms, but said plaintiffs at all times failed to

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pay any part of said indebtedness and advances, and in May, 1900, at the request of the said plaintiffs, made through W. L. Eagleton then and there their agent and duly authorized in that behalf, this defendant extended the time for payment of said advances and interest until October, 1900, upon the express agreement that this defendant should have the hay crop growing upon said lands to put against and apply upon said advances, taxes, and interest; this defendant in the meantime having paid an additional year's taxes upon said property in the additional sum of \$33.00 and penalty in the sum of \$1.31. That in pursuance to said agreement, whereby said payments were extended until October 1900, this defendant did take a portion of the hay crop from said premises for the year 1900, and apply the same upon said advancements. Said hay crop was of the value of \$20.00 and not more. This defendant never at any time took possession of any portion of said premises prior to the execution and delivery of the said deed mentioned in plaintiff's petition and described therein as 'Exhibit E.'

"That after the expiration of the extension of time aforesaid, until October, 1900, the said plaintiffs continually requested this defendant to further extend the time of payment and not foreclose upon said premises, and this defendant during all said times was advising the said plaintiffs that they might redeem said lands from said indebtedness and mortgage and deed, and that this defendant would accept the payment of the entire indebtedness of the payment of the advances and accrued interest and continue the loan, but these plaintiffs were during all of said times unwilling to make any payments and were unwilling to keep up the taxes on said premises and to pay the same, as they were continually accruing, so that there had accrued as taxes for the year 1900 the sum of \$26.34 with \$1.36 as additional penalty thereon, which this defendant had paid in order to protect his aforesaid mortgage. In the meantime there had accrued as additional interest due upon the 24th day of October, 1900, the sum of one hundred dollars. No part of said original indebtedness evidenced by said note nor any of the interest had ever been paid, nor had any of the aforesaid advances been refunded, and this defendant had been to large expenses in protecting his aforesaid interest and the lien of said mortgage so that in the winter of 1900-1901, and in the early spring of 1901, the plaintiffs in writing requested this defendant to consent to accept a portion of the said lands in satisfaction of

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their aforesaid indebtedness to him. The said plaintiffs being at said time fully advised and knowing that the said mortgage and deed constituted but a mortgage and lien upon said premises, for the aforesaid indebtedness. This defendant at that time believed the said lands to be worth but little more than the amount due upon said indebtedness, and said plaintiffs offered to convey one-half of said lands in satisfaction of said indebtedness, but this defendant was unwilling to accept the same as he believed one-half of the lands to be worth much less than the amount of the indebtedness, but upon the repeated solicitation of said plaintiffs this defendant finally consented to settle the said indebtedness by taking a conveyance of said lands and re-conveying twenty-five acres of said tract to the plaintiff, Mrs. Mary B. Herbert, the said agreement being entered into by this defendant at the solicitations of these plaintiffs, and as an accommodation to plaintiffs to save them of the expense of a foreclosure of said mortgage and the entire loss of said lands, and in said agreement the said defendant allowed for the said fifty-five acres retained by him more than its value at that time, and said transaction was entirely without oppression upon the part of this defendant and without any undue influence upon the part of the defendant. And in entire good faith this defendant canceled the securities and all the indebtedness of the said plaintiffs to the said defendant. Said agreement was executed and carried out by the necessary conveyances, copies of which are attached to plaintiff's petition, and marked respectively 'Exhibits E & F,' and that to induce this defendant to execute said agreement and accept said conveyance, the plaintiff Mary B. Herbert represented that she believed her husband to be dead, and that she had not heard from him for a long time and did not know of his whereabouts. Said conveyances were executed on the 28th day of May, 1901. That after the aforesaid settlement and after the execution of the aforesaid conveyance and up until the present time, the said plaintiff Mary B. Herbert has resided upon the twenty-five acres conveyed to her by said deed marked 'Exhibit F,' and had had full notice and knowledge during all of said time of all the acts of this defendant with reference to said lands, and has had full knowledge and notice of all the improvements constructed on said premises by other persons, grantees of this defendant as hereinafter stated, and has during all of said time known of the platting of said lands and of the

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expenditure of large sums of money by defendant in surveying, platting, and improving said lands, and never at any time prior to the bringing of this action had she or any one in her behalf, or had either of the plaintiffs, ever expressed any dissatisfaction with the aforesaid settlement; but, subsequent to the aforesaid settlement, the said Mary B. Herbert thanked this defendant in writing for his kindness to her in making said settlement and accepting a portion of said lands in satisfaction of his said debt, and had repeatedly expressed her pleasure and satisfaction with said settlement, and did on the 6th day of July, 1901, agree in writing to procure the signature of the aforesaid W. H. Herbert to the aforesaid conveyance marked 'Exhibit E' in the event that the said W. H. Herbert should be alive, and which agreement is hereto attached marked 'Exhibit A' and made a part hereof, and the said Mary B. Herbert thereby acquiesced and affirmed the aforesaid settlement and conveyance; said agreement being executed for the purpose of quieting any question as to the title of said lands, and to enable this defendant to sell the same without question as to title, the question having been suggested that perhaps said Mary B. Herbert could not lawfully convey said lands unless joined in the deed by her husband.

"That in reliance upon the aforesaid conveyance and the affirmation thereof, and in good faith, and fully believing that he had paid adequate and full consideration for the aforesaid fifty-five acres of said land, and that plaintiff was fully satisfied therewith, this defendant took possession thereof, expended large sums of money in improving the same and laying out and surveying and platting the same as an addition to the town of Cleveland, adjoining which said lands are located, and thereafter this defendant sold large tracts and bodies of said lands to the other defendants in this cause and to their grantors, all of whom were purchasers for a valuable consideration and without notice of any claim of the said Mary B. Herbert, or either of the plaintiffs herein.

"That this defendant is still the owner of all the said fifty-five acres of land not conveyed to purchasers in good faith or for a valuable consideration and without notice of any claim by the said plaintiffs or either of them adverse to this defendant's fee simple title. That the defendant paid all the taxes on said land for the year 1901, in the further sum of \$33.14, together with 46c penalty. That plaintiffs nor either of them, prior to the bringing of this

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action, paid any taxes on said fifty-five acres of said land, nor exercised any act of ownership over any part thereof after the execution of the aforesaid deed and mortgage marked 'Exhibit E.' and neither of them claimed at any time to be the owners of any portion of said tract prior to the bringing of this action; never at any time offered to reimburse this defendant for any of the taxes which he had paid or laid out in that behalf or to pay him any of the original indebtedness or interest thereon, but claimed to exercise rights of ownership in the twenty-five acres by him conveyed to the said Mary B. Herbert free and clear of this defendant's aforesaid deed and mortgage and did convey large tracts of the same by deed of general warranty to other and bona fide purchasers and did appropriate the proceeds thereof to their own use and benefit, said conveyance being made subsequent to defendant's conveyance to Mary B. Herbert in the aforesaid final settlement, whereby the said Mary B. Herbert affirmed the aforesaid settlement and conveyance in settlement. During all the time after the aforesaid conveyance marked 'Exhibit E' this defendant was continually selling portions and tracts of said lands to innocent purchasers for value, who were continually erecting extensive and valuable improvements upon said land and improvements worth very much more than the lands upon which they were erected and very much more than the whole tract of land, all of which facts the said Mary B. Herbert was at all times cognizant of and in which she acquiesced and against which she never made protest or objection, although during all the said time residing and in plain view thereof and within a half-mile thereof. That at the time of the settlement of this plaintiff and defendant and at the time of the execution of the conveyances marked 'Exhibits E & F' the said land was of little value, was adjoining the town of Cleveland, Pawnee county, Oklahoma Territory, aforesaid, and which said town did little business, was without a railroad, was twenty-four miles from county seat, and had but small trading territory tributary thereto, and the commercial prospects for the said town were not good, and the prospects for the increase of said town, or the development of said town were not good, and they had no immediate prospects of a railroad, and the said town was difficult of access. That by the platting of said lands and the surveying thereof and the laying the same out as an addition to the town, their value was materially increased, and that by the construction of dwellings and buildings thereon prior

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to the bringing of this action, their value was much more increased, and that the commercial outlook for the said town before the bringing of this action had become much brighter, the permanent survey of the Missouri, Kansas and Texas Railway was extended through the said town upon the main line extending from Kansas City, Missouri, to Oklahoma City, Oklahoma, and likewise the St. Louis & San Francisco R. R. had definitely located its line of railway to join the said Missouri, Kansas and Texas Railway with the county seat of said Pawnee county and a few miles distant from said town, and the said lines of railway were in actual course of construction, and since the institution of this action have been built, and by reason of the premises and for other reasons the value of the aforesaid property prior to the commencement of this action had increased in (value) to more than ten times its value at the time of the aforesaid conveyance; and since the commencement of this action it has increased in value many hundred times its value at the commencement of this action, and the plaintiff herein Mary B. Herbert having acquiesced in the aforesaid settlement and conveyance which were in all things fair, reasonable, and just, and having permitted the expenditures by this defendant of large sums of money in the improvements of the said lands, and having slept upon her rights in the premises from the date of the execution of said 'Exhibit E' until the commencement of this action, for a space of more than two years, and having confirmed the aforesaid settlement and conveyance by agreement to procure the signature of her aforesaid husband W. H. Herbert to the conveyances of this defendant, and by conveying land free from the lien of this defendant's mortgage, and which she did by virtue of said settlement, she is now estopped from asserting right, title, interest, or equity in or to the said lands or any part thereof.

"Wherefore this defendant prays that she take nothing by her action, that defendant recover his costs herein, and that said plaintiff be forever barred of all right, title, interest, or equity in or to said lands or any part thereof, and that she be enjoined from in any manner asserting the same, and that this defendant's title in and to the above-mentioned fifty five acres of land be quieted as against all claims of the plaintiff and any and all other persons claiming by, under, or through her, and that this defendant have such other and further relief as is consistent with equity and good conscience."

To this answer of S. R. Wagg the plaintiff filed a reply, con-

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sisting of a general denial. Upon the issues thus joined the cause was tried to the court without a jury, and, after a large volume of evidence was submitted by both parties to the action, the court found the issues in favor of the plaintiff and against the defendant, S. R. Wagg. And the court thereupon adjudged and decreed the deed executed by Mary B. Herbert on May 28, 1901, to be a mortgage upon the land described in the plaintiff's petition, and that the mortgage be declared a lien upon said property for the principal sum of one thousand dollars, with interest as stipulated in the mortgage bearing date October 24, 1898, executed by Mary B. Herbert and W. H. Herbert, and subject also to the further provisions of said mortgage, a copy of which is attached to plaintiff's petition. It was further decreed that the plaintiff be reinvested with title to said property, subject to said mortgage lien and for taxes and expenses properly incurred, and that an accounting be had between the plaintiff Mary B. Herbert and the defendant S. R. Wagg, for the purpose of determining the amount of moneys received by Wagg for the lots sold by him and money received from said property, and that in case the defendant Wagg has received from the sale of said property and products of said land a sum in excess of that which is due him under the findings and judgment of the court, judgment be rendered for such sum in favor of the plaintiff and against the defendant. It was further decreed that a referee be appointed for the purpose of taking the testimony and determining the questions arising on the accounting between the plaintiff and defendant Wagg, and to ascertain what land or lots were sold to *bona fide* purchasers prior to the institution of suit, and also find what lots were not sold, and that all parties who were not made defendants in this action or claiming any interest in the property or lots in the Wagg addition should have a right to intervene to have their rights determined in this action, and that the rights of subsequent purchases through and under Wagg be determined, and for costs of this action. To which findings, judgment, and decree of the court the defendant Wagg duly excepted, and which exception was allowed.

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Thereupon, within time, the defendant Wagg filed his motion for new trial and asked for a reversal, on the following grounds: First. Because said judgment is not sustained by sufficient evidence. Second. Because said judgment is contrary to law. Third. Because of errors of law occurring at the trial and excepted to by the defendant S. R. Wagg at the time. Fourth. Because the court admitted testimony over the objections of the defendant S. R. Wagg, to which he at the time duly excepted. Fifth. Because the court refused to admit testimony offered by the defendant S. R. Wagg, which refusal was at the time excepted to by the defendant S. R. Wagg. This motion, after being duly considered by the court, was overruled, and exceptions noted, and the defendant S. R. Wagg brings the case here for review.

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HAINER, J.: It is the contention of the plaintiff in error that the petition, if all the facts were admitted, does not state facts sufficient to constitute any right to relief. It is further contended that the evidence does not sustain the allegations of the petition fairly construing the most adverse testimony and taking it as uncontradicted. Plaintiff in error further contends that, even if plaintiff below had made out a case on her petition and evidence, the unquestioned and undisputed facts show a complete defense. These contentions in our opinion are clearly untenable. The evidence in this case discloses that after some extended negotiations between W. H. Herbert and his wife, Mary B. Herbert, and the plaintiff in error, S. R. Wagg, the plaintiff secured a loan from Wagg for \$1,000, and as evidence of such indebtedness executed to Wagg a promissory note dated October 24, 1898, payable 5 years after date, with interest payable annually in advance. Wagg deducted \$100 from the principal sum loaned, being one year's interest. To secure the payment of said note, W. H. Herbert and his wife, Mary B. Herbert, executed a mortgage upon 80 acres of land adjoining the town of Cleveland. At the time of the

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execution of the mortgage, and as further security therefor, and in accordance with the previous negotiations, Herbert and his wife executed a warranty deed to the premises, said deed to be deposited in escrow with the Bank of Cleveland, and to be delivered to Wagg upon breach of the terms of the mortgage.

The following letters from S. R. Wagg to W. H. Herbert and Mary B. Herbert will shed some light upon these transactions, and are, we think, very material to the determination of the rights of the parties. One of these, dated Appleton, Wis., September 25, 1898, appears upon page 55 of the record, and reads as follows:

“Appleton, Wis., Sept. 25, 1898.

“W. H. Herbert, Cleveland, Okla.

“My dear Sir:

“Yours of the 15th at hand and it's satisfactory as a fair declaration to do, and I have began to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you describe and would not. I have been made to hesitate on account of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit and call it off.

“You execute a warranty deed to me to be placed in escrow and held by the Bank of Cleveland or A. A. Drown in trust for the fulfillment of the terms of the mortgage in case you fail to fulfill the terms and are in default of interest or other terms for 6 months; then the deed is to be delivered to me or my order. The mortgage is for \$1,000.00. I will deduct the first years interest. \$100 and send \$900.00 to the bank with instructions. This pays one year's interest. The second year's interest is not due until the end of the second year and six months grace on the end of this makes a full 2 & 1/2 years before you allow or I can ask for the deed in case of default of contract.

“I do this solely in the interest of protecting myself against injunctonal and interference proceedings from interlopers and blackmailers—in case such an unpleasant thing as foreclosure proceedings should ever be necessary. I do not expect such a thing will ever occur. If I did no loan would be made, but I am now looking to the extreme of the case, and its easiest protection for

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me. You can ask Mr. Drown how I deal with men. I never knowingly distress a man and am not inclined that way but want contracts lived up to.

"The papers you executed have not arrived here as yet to my knowledge. They will be all right when completed and I have examined them and all that will be necessary is to execute the deed in connection with them and place in the hands of trustees as indicated above for the purpose named. I trust this will meet your views. On execution of papers you can have money.

"S. R. Wagg."

On page 56 of the record appears the following letter from Wagg to the Bank of Cleveland:

"Appleton, Wis., Sept. 30, 1898.

"Bank of Cleveland, Oklahoma.

"Gentlemen:

"Referring to your letter of Sept. 9, 1898, on the Herbert loan; I enclose you \$900.00 to perfect the loan after clearing the title perfectly as stated you are willing to do and you are only allowed to pay any money until all liens are paid and the mortgage is recorded wrote and sent; and not until then. This apply money in payment of prior mortgages or liens and clear and perfect title to me so I am first lien and have the money applied as purchase money on the records in liquidating prior claims. There must be also attached to this mortgage the abstract of title under recorder's seal. Map references by name where 80 is located, meets and bounds inserted in the mortgage locating the land so you know it is the identical 80 near Mr. Drown's store, also register's certificate that my mortgage is first lien the title having been cleared and now rests on my mortgage. You are instructed to consult with Mr. Eagleton, Pawnee my paid attorney in this matter; let this in no way affect you in carrying out instructions except to work harmoniously to protect my interests. You also to write me the strongest form of promissory note suitable to attach to the mortgage and payable to my order at your bank. I have also asked Mr. Drown to look over the papers and description of land and locate in my interest and to ask you to let him read this letter. A waiver clause on foreclosure is also inserted in the mortgage, written on the Wisconsin form asking that you carefully protect my interests in the transaction and anything I have omitted to do to notify me before acting further. Charge

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Herbert for the work in getting ready the papers for delivery to me with clear title. For handling the money and paying him send the bill to me. I shall want you to collect interest when due with him and future loans.

"All done pay balance to Herbert. Mrs. W. H. have witness to the note.

"Yours truly,

"S. R. Wagg.

"To Bank of Cleveland, Oklahoma. You hold the deed in escrow."

And on page 60 of the record appears the following letter from Wagg to the Bank of Cleveland:

"Appleton, Wis., Nov. 8, 1898.

"Bank of Cleveland, Oklahoma.

"Gentlemen:

"You are herewith instructed to deduct your bill of \$3.45 from the \$900.00 sent you on account of Herbert loan and return balance \$896.55 to me, unless Mr. Herbert and wife at once properly executed the mortgage deed (warranty) I sent you; and deposit a warranty deed in escrow with you as trustee; further securing the loan; all as instructed in my prior letters, you to see a clear and full description of the land on limits and boundaries is inserted in mortgage fixing the identity of the land lived on together with an insurance on the house assigned as additional security. All former instruction not in accordance with the above is hereby withdrawn. Your action is requested with bill of services.

"Yours truly,

"S. R. Wagg."

It seems from the evidence that a misunderstanding arose between Wagg and the Herberts with reference to the time of the payment of the second installment of interest. It will be observed that Wagg in his letter dated September 25, 1898, stated as follows: "The mortgage is for \$1,000.00. I will deduct the first year's interest, \$100, and send \$900.00 to the bank with instructions. This pays one year's interest. The second year's interest is not due until the end of the second year and six months grace on the end of this makes a full 2 & ½ years before you allow or I can

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ask for the deed in case of default of contract.” Notwithstanding this letter, Wagg insisted that the interest was due and payable on the 24th of October, 1899, and in response to his letter demanding the second installment of interest, W. H. Herbert writes the following letter, dated October 25, 1899, to Wagg, and which appears on page 64 of the record:

“Cleveland, O. T., Oct. 25, 1899.

“Mr. S. R. Wagg,

“My dear Sir:

“I received an order from you to pay Mr. L. M. Drown \$100.00 due, as interest, by the terms of your last letter to me, I have been led to suppose I had considerable time yet, and it caught me by surprise. I can usually furnish \$100.00 at short notice.

“The deal from which I can spare the money will not be consummated for two weeks. I ask extension for that time. I send you copy of the letter that I have been governed by, and which I presume has misled me.

“Letter from you, after some preliminaries you write, the mortgage is for \$1,000.00. I will deduct the first year's interest \$100.00, send \$900 to the bank with instructions. This pays first year's interest. The second year's interest is not due until the end of the second year, and six months grace on the end of this makes a full two and one-half years before you allow, or I can ask for the deed in case of default of contract.’

“This is a copy of your letter that I have been governed by and it seems it has misled me.

“I am,

Very truly yours,

“W. H. HEBBERT.”

It will be observed that in this letter Herbert calls the attention of Wagg to the contents of his letter dated September 25, 1898, in reference to the time of the payment of interest. On November 1, 1899, Wagg wrote Herbert the following letter, which appears on page 65 of the record:

“Appleton, Wis., Nov. 1, 1899.

“W. H. Herbert, Cleveland, Okla.

“My dear Sir:

“Your letter of recent date at hand, and noted. We had con-

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siderable correspondence prior to the mortgage contract. When the contract is completed and signed that is the agreement. I would be convenient to have the money to use; but if you are hard pressed for money I shall not think of distressing you, for about all I want is security that is safe and does not worry me. When you get it pay Mr. Drown with deferred interest and get the receipt sent. With best wishes,

“Yours truly,
“S. R. WAGG.”

The Herberts, not having paid the second year's interest at the time Wagg demanded the same, Wagg procured the deed from the Bank of Cleveland, and caused it to be placed on record on December 26, 1899, in the office of the register of deeds of said county, and thereafter Wagg claimed to be the owner of said property by virtue of said deed. And on February 17, 1900, he wrote his agent, Drown, the following letter, appearing on page 78 of record, authorizing his agent to collect the rents, etc.:

“Appleton, Wis., Feb. 17, 1900.

“Mr. Leroy Drown,
“Cleveland, Okla.

“You are hereby authorized to act as my agent in looking after my lands and tenants on the Herbert property at Cleveland, Okla. Collect rents monthly; sell the hay crop standing if possible and report to me once in three months and keep me advised of any change of interest from time to time.

“Deposit all proceeds in bank to my credit.

“Yours truly,
“S. R. WAGG.”

And again on February 27, 1900, Wagg authorizes his agent, Drown, to take possession of the premises in accordance with the following letter, which appears on page 79 of the record:

“You take possession of all vacant houses, or have it done for me, on the Herbert place. and rent them as best you can. Don't let any squatters get back. They are easy rid of now. Keep rid of them, and don't let a person in except on a good lease, so you can get him out without expense. Herbert we will treat generously. I wish him well.

“Yours,
“S. R. WAGG.”

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On April 14, 1900, Wagg wrote Herbert and his wife the following letter:

“Appleton, Wis., April 14, 1900.

“W. H. Herbert and wife,
“Cleveland, Oklahoma.

“I expect to be in your city or town in the near future and inasmuch as the loan of October 1898, is in default of payment of interest, and the 6 months allowed you as grace in which to make it good expires during the month of April, 1900, I ask that you make up all payments due to date either to me or place to my credit in Bank of Pawnee subject only to delivery of my receipt for same, otherwise the title to the Cleveland homestead will by virtue of our agreement and papers of record, pass to my ownership and control. I hope you will pay up past dues and notify me of action you take in the matter. I am,

“Yours truly,

“S. R. WAGG.”

And on April 30, 1900, Wagg wrote Herbert as follows:

“Appleton, Wis., April 30, 1900.

“W. H. Herbert,
“Wichita, Kansas.

“My dear Sir:

“Your letter of the 27th at hand. I was obliged by circumstances you made, to put my deed on record, allowing the property to be offered at tax sale. I sent money to pay them.

“I do not propose to be hasty or unfair, if you want to pay the interest up, you can do so, I have not asked for any full payment of principal, the interest will do—I had not intended to foreclose or turn you out of the house, and shall not unless you fail to do anything. I expect the hay crop will help pay the interest. I shall trust you for it. I shall expect to be in Cleveland but do not go to the expense to see me. If you are there. I shall be glad to see you.

“Yours truly,

“S. R. WAGG.”

On July 12, 1900, Mrs. Herbert wrote Wagg the following letter, which appears on pages 85 and 86 of the record:

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"Cleveland, Okla., July 12, 1900.

"Mr. S. R. Wagg,

"Appleton, Wis.

"Dear Sir:

"I write believing you will see the justice of the request I am about to make. The anxiety I suffer in regard to my home is undermining my health. The condition of the land precludes the possibility of my using it to the benefit of myself and children. I wish you to have the equivalent of the rent in land if I do not get the money to pay you, but I do not wish to give double, and since you have seen the land you must recognize it is more valuable than the amount you have in it. I wish to know if you would take half the land for the debt? The half next to Cleveland, which is the more valuable, I presume. I wish to have the other free from incumbrance to cultivate for a living for my children. If you are not willing to do this, would you allow me to sell forty acres, which I can do, to cancel the indebtedness; that is to obtain a purchaser, the money to be paid to you? When you was here you said you did not want the land, you only wanted your money which I am anxious for you to have. I write this knowing you could not possibly in justice to your ideas of right, take all the land for the debt, especially as I am not responsible for it and I would necessarily be the chief sufferer. If you accede to this request you will remove a great burden from me and I can proceed to arrange to have forty acres broken this fall in readiness for cultivation in the spring. The home is so much more to me than the money can possibly be to you; however, I am sure you will understand I desire to settle the affair in justice to us both. I wish you to have your money or its equivalent in land, but I do not want to lose my home. Half of the land means a home to me and support for myself and family, to lose it means to us to be homeless. I present the matter thus plainly that you may realize what is involved in it to me, hence it seems to me the only just way to us both, to settle the affair, under the circumstances, is to divide the land. I mean, of course, if we should be disappointed and be unable to get the money for you before the expiration of the time you have extended. I think I will have it, but as there are few things absolutely certain in life and desiring so much for my health's sake, to be relieved of the strain in connection with the matter, I appeal to you, be-

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lieving you will be disposed to show the same mercy you would like shown to yourself or loved ones.

"Hoping to be favored with an early reply, I am,

"Very respectfully,

"(MRS.) W. H. HERBERT."

To this letter Wagg replied as follows, on July 18, 1900:

"Appleton, Wis., July 18, 1900.

"Mrs. W. H. Herbert,

"Cleveland, Okla.

"My dear Madam:

"Your favor of the 12th is before me, in reply will say I do not incline to a division of the land; but under the condition I will deed back to you the land for \$1,300.00 October or November next as you can arrange, the back interest, taxes, expenses incurred and holding the principal five months before loan was closed amounts in all to \$1,280.00 and as the loan is for five years, it is a concession I would not make with a business man and only do it to you as your situation merits some consideration, so I do this for immediate action and acceptance on your part—notify me of your intention in the matter.

"Yours resp'y,

"S. R. WAGG."

And again on August 11, 1900, Wagg wrote Mrs. Herbert as follows:

"Appleton, Wis., Aug. 11, 1900.

"Mrs. W. H. Herbert,

"Cleveland, Okla.

"Dear Madam:

"Your favor of some weeks ago, asking for a reconsideration of my declining to divide the land came to hand and is noted. On payment of \$1,300.00 October or November 1st, 1900, I will quit-claim deed to you or your purchaser one-half the Herbert homestead deed to me and deed the remaining half farthest from or west of Cleveland to your two boys jointly reserving to you a life interest in the same; provided you explain clearly and satisfactorily to me how and by what means W. L. Eagleton obtained title to the house located on the said homestead and is now renting and claims the rights of a property holder to do so and collect rents. If anything is done would like to close it up entirely. I never

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had thought of turning you out and do not expect ever to do such a thing. Awaiting your further communication, I am,

"Yours truly,

"S. R. WAGG."

On August 19, 1900, Mrs. Herbert wrote Wagg in part as follows:

"Your letter of the 11th inst. has been received. I thank you for your consent to a division of the land. The way you propose to deed it is an advantage in some respects and a disadvantage in others from my point of view. I have not yet decided which outweighs the other, however we can speak of this later if desired. I was hoping you would not only agree to a division, but that you would decide to retain the forty acres, because if you would hold it for a year or two I could redeem it with interest on the investment; in other words buy it back from you if you wished to sell it, whereas if it is sold to another party would possibly not have an opportunity to redeem it."

September 15, 1900, Wagg wrote Mrs. Herbert as follows:

"Appleton, Wis., Sept. 15, 1900.

"Mrs. W. H. Herbert,

"Cleveland, Okla.

"Dear Madam:

"I am in receipt of a letter from L. M. Drown regarding an answer to your last letter replying to mine of August 11th, I did not think an answer necessary. However you can go ahead and find a purchaser at \$1,300.00 for the east (half) and I will deed the other half jointly to your two boys, giving you the first right to the income from the same in form of a life interest. This places it beyond the power of any one to scheme you out of it. I make this offer solely in the interest of yourself and your boys. I reserve the right of one acre on the east side, near Mr. Drown's store for warehouse purposes, same to be located when deed is made.

"I hope you may be able to realize your wishes in securing a home for yourself and boys. If you cannot make this sale, I will devise another plan later.

"Yours respectfully,

"S. R. WAGG."

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On December 24, 1900, Wagg wrote Mrs. Herbert the following letter, which appears on pages 95 and 96 of the record:

“Appleton, Wis., December 24, 1900.

“Mrs. Mary B. Herbert,
“My dear Madam:

“Referring to your last communication, wherein you wanted time to sell extended to Jan. 1901.

“I hope you have been able to find a buyer. However, you can have until March 1st next if you need such time.

“If you should feel like making a division of the land as a final settlement of the matter and passing deeds although I hold a deed of it all and under our agreement it all is now conveyed to me, yet I shall not use any rights I may have harshly but shall deed to you and your boys a piece of the land preferably on which the house is located so you may still live there and have the land to cultivate for your support. You talk it over with Mr. L. M. Drown and have him write me.

“I remain,

Yours respectfully,

“S. R. WAGG.”

Another question which we must briefly notice in connection with this transaction is, whether the consideration was adequate to induce a fair sale and settlement of the indebtedness existing between the parties. There was evidence offered on behalf of the plaintiff that there was gross inadequacy of consideration, and that the reasonable value of the property was several times in excess of the amount of indebtedness at the date of the execution of the deed dated May 28, 1901. The witness Lytton testified, on page 135 of the record, that the reasonable market value of the land was about \$100 per acre at that time. The witness Skinner testified, on page 248 of the record, that the fair value of the land would be from \$50 to \$100 per acre; and the witness Crismon, on page 257 of the record, testified that the reasonable market value of the land would be \$100 per acre at the date of the execution of said deed. On the other hand, the witnesses on behalf of the defendant testify that the land was worth at that time about \$25 per acre. So, upon this question the evidence was clearly contradictory.

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It appears from all the evidence introduced, and it is conceded in the brief and argument of counsel for plaintiff in error, that the escrow deed was merely a mortgage given as additional security for the payment of the debt. It further clearly appears that the first year's interest was deducted from the loan, and that, according to Wagg's letter to the Herberts, the second installment of interest would not be due until the end of the second year. But this was in contravention of the express terms of the note and mortgage, hence the note and mortgage must govern in that respect. However, we think it sufficient to mislead the Herberts in respect to the time the interest became due, and that it was but fair and reasonable that extended negotiations would follow in respect thereto. But, upon the undisputed testimony, Wagg committed a fraud upon the rights of the Herberts when he procured the escrow deed from the bank and had it placed on record on December 26, 1899, and when he claimed title thereunder. Assuming that the second installment of interest was due on October 24, 1899, and that there was a default in the payment of the interest on December 26, 1899, yet under the express terms of the escrow deed it could not be withdrawn and placed upon record until six months had expired from the date of the default in interest on October 24, 1899. But, even if he had a right to place the escrow deed on record, it could only amount to a mortgage and as additional security for the payment of the indebtedness existing between Wagg and the Herberts. He had no right to claim title thereunder, and he was not entitled to take possession of the premises and collect the rents, etc., as the evidence clearly establishes in this case. To insist that the escrow deed was an absolute conveyance which divested all plaintiffs' title and interest in the property, and to take possession of the property and collect the rents, clearly constitute in equity a fraud upon the rights of the Herberts; and the taking of possession of the premises, collecting the rents, claiming title to the land, and the securing of the deed dated May 28, 1901, was not only taking undue advantage of the

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mortgagors, but was an unfair and unconscionable transaction which cannot be upheld by a court of equity. It must, therefore, follow as an irresistible conclusion that the allegations in the petition of fraud, oppression, undue influence, and inadequate consideration were fully sustained by the evidence, and we are unable to perceive how the trial court could have reached any other fair, just, and rational conclusion upon the entire evidence as disclosed by this record.

It is a settled rule of this court, and one which we have reiterated and reiterated time and again, that where the evidence reasonably sustains the finding and judgment of the court, or where the evidence is conflicting, it will not be disturbed by this court. The law of this case is so well settled by the authorities that we deem it necessary to refer to only a few of the leading cases, which we regard as peculiarly applicable to the facts of this case and as decisive of every question arising herein. The leading decision on this class of cases is *Russell v. Southard*, 12 Howard 139, decided by the supreme court of the United States as early as 1851. In this case it was held that: "To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be. In *Conway v. Alexander*, 7 Cranch 238, C. J. Marshall says: 'Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances, which are to determine whether it was a sale or a mortgage.' And in *Morris v. Nixon*, 1 How. 126, it is stated: 'The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face.' These views are supported by many authorities. *Maxwell v. Montacute*, Precedents in Ch. 526; *Dixon v. Parker*, 2 Ves. Sen. 225; *Prince v. Bearden*, 1 A. K. Marsh. (Ky.) 170; *Oldham v. Halley*,

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2 J. J. Marsh (Ky.) 114; *Whittick v. Kane*, 1 Paige (N. Y.) 202; *Taylor v. Luther*, 2 Sumner (U. S.) 232; *Flagg v. Mann*, *ibid.* 538; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Brainerd v. Brainerd*, 15 Conn. 575; *Wright v. Bates*, 13 Verm. 341; *McIntyre v. Humphries*, 1 Hoff. Ch. (N. Y.) 331; 4 Kent, 143, note A; and 2 Greenl. Cruise, 85, note." And, again, in this case it is stated: "But the inquiry still remains: What amounts to an allegation of fraud, or of some vice in the consideration? And it is the doctrine of this court that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and we know of no court which has stated this doctrine with more distinctness than the court of appeals of the state of Kentucky. In *Edrington v. Harper*, 3 J. J. Marshall, 355, that court declared: 'The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised.'" Upon the question of consideration, this doctrine is announced in this opinion: "In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. *Conway v. Alexander*, 7 Cranch (U. S.) 241. *Morris v. Nixon*, 1 How. (U. S.) 126; *Vernon v. Bethell*, 2 Eden 110; *Oldham v. Halley*, 2 J. J. Marsh (Ky.) 114; *Edrington v. Harper*, 3 *ibid.* 354." Upon the question of assent to the sale, the learned court says: "It is

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true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden 113, 'are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.' In conclusion, the learned court says: "The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage." And again, in speaking of the rights of the mortgagee with reference to the extinguishment of the equity of redemption of the mortgagor, the court says: "A mortgagee in possession may take a release of equity of redemption. *Hicks v. Cook*, 4 Dow, P. C. 16; *Hicks v. Hicks et al.*, 5 Gill & Johns (Md.) 85. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skillful to take advantage of the necessities of the borrower. Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale, in *Webb v. Rorke*, 2 Sch. & Lef. 673, that: 'Courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given.' And Chancellor Kent, in *Holdridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 34, says: 'The fairness and the value must distinctly ap-

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pear.' *Wrizon v. Cotter*, 1 Ridg. 295; *St. John v. Turner*, 2 Verm. 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, in as much as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized, when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase."

It will thus be seen that it is not necessary to establish actual fraud, but only constructive fraud, and that an unconscientious advantage was taken of the borrower. We think that in this case the evidence not only clearly proves constructive fraud, but it also clearly proves actual fraud, oppression, undue influence, and unconscientious advantage, and in addition thereto inadequate consideration. But the plaintiff in error, on page 51 of his brief, makes the following remarkable statement: "But the claim of plaintiff in error was right, as a matter of law, or else the supreme court of California, on a statute identical with ours, did not know the rights it was attempting to adjudicate, in *Bradbury v. Davenport et al.*, 52 Pac. 301." We have examined this authority, and an examination of the same discloses the following sentence, immediately following the quotation in the brief of counsel for plaintiff in error: "But, under the facts found, we are unable to perceive wherein the transaction is to be distinguished in any material respect from that sustained in *Watson v. Edwards*, 105 Cal. 70, 75, 38 Pac. 527, and in *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499, nor in fact why the question is not in effect concluded by what is said on the same subject on the former appeal. *Bradbury v. Davenport*, 114 Cal. 593, 46 Pac. 1062. In *Watson v. Edwards* it was held that section 2889 of the civil code does not affect or refer to a subsequent contract between the mortgagor and mort-

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gagee in respect to the title to the mortgaged premises, and it is said: 'A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, *where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee.*'" The italics are ours. We concur with this doctrine announced by the California court, which counsel states is based upon a statute identical with ours. It will thus be seen that the doctrine announced by the California courts is in full harmony with the doctrine announced by the supreme court of the United States in the case of *Russell v. Southard*, *supra*, and in harmony with the views herein stated. It holds, as all the courts hold, that a mortgagee may purchase from the mortgagor if the transaction is fair, honest, and without fraud or undue influence, and where no unconscionable advantage is taken by virtue of the relation existing between the mortgagor and mortgagee. But upon the issue of fraud, undue influence and unconscionable advantage, the trial court found the issues in favor of the plaintiff and against the defendant, and such finding and judgment of the court upon the evidence adduced is conclusive upon this court, there being ample evidence to sustain such finding and judgment.

In *Vance v. Anderson*, 45 Pac. 818, the supreme court of California has stated the doctrine as follows. "A deed absolute on its face may be shown by parol to be intended as a mortgage. It may be stated as a general proposition that in this state, at least, every conveyance of real property made as security for the performance of an obligation is in equity a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject-matter, are subjects for consideration. *Campbell v.*

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Freeman, 99 Cal. 546, 34 Pac. 113; *Pierce v. Robinson*, 13 Cal. 116; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Ross v. Bruisie*, 64 Cal. 245, 30 Pac. 811; *Taylor v. McLain*, 64 Cal. 513, 2 Pac. 399."

In *Bradbury v. Davenport et al.*, 46 Pac. 1062, on appeal to the supreme court of California for the first time, the following doctrine is announced: "A conveyance of the mortgaged premises by the mortgagor to the mortgagee, by delivery of deed in escrow, to be delivered in case of the non-payment of the mortgage deed within a certain time, will be set aside where the property is of double the value of the indebtedness." The plaintiff's evidence in this case discloses that the value of the property at the time the last deed was executed on May 28, 1901, was at least three or four times the value of the total indebtedness of the mortgagor. And further in the same opinion it is stated: "In relation to such subsequent agreement, Jones, in his valuable work on *Mortgages* (Section 251), says: 'A subsequent agreement that what was originally a mortgage shall be regarded as an absolute conveyance is open to the same objection (that is, the objection to such agreement in the mortgage itself), and will not be sustained unless fairly made, and no undue advantage is taken by the creditor. The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration.' In support of this proposition, the author cites, among many other cases, *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, from which we quote the following passage: 'The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive

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hopes. He must exercise no undue influence. He must take no advantage of the fears and poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law.'” The supreme court of California also quotes with approval the doctrine announced in *Russell v. Southard, supra*.

But it is contended by the plaintiff in error that the plaintiffs were guilty of laches. There is no merit to this contention. This suit was commenced in the district court on June 12, 1903, about two years after the execution of the last deed dated May 28, 1901. The note evidencing the indebtedness was dated October 24, 1898, and the mortgage and escrow deed securing the payment of the same were executed at the same time. The escrow deed of October 24, 1898, contains the following stipulation: “This deed is given to be held in escrow as additional security to grantee for loan of \$1,000 this day loaned to the grantors, and for which they have this day given the grantee a mortgage on the same land.” In *Russell v. Southard, supra*, this same question was raised, and the court in that case said: “This bill was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard, the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished

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by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights must not be allowed to subject the defendants to the risk of injustice." So we think that, under the evidence and circumstances of this case, it would be inequitable and unjust for the court to hold that the plaintiff was guilty of such laches as would preclude her from maintaining this action.

What, then, is the status of the plaintiff in error and the defendant in error? The answer to this question we think is clear. It is that of borrower and lender, of debtor and creditor, mortgagor and mortgagee in possession. Equitable principles must control a full and complete settlement of the rights of the parties to this action. Wagg is entitled to be paid for the principal indebtedness, together with interest at the rate specified in the note and mortgage, for all taxes, assessments, and other proper charges and expenses necessary for the management and protection of the estate, and he is responsible to Mrs. Herbert for rents and profits to be applied upon the indebtedness. And the rights of all subsequent purchasers in good faith for a valuable consideration, without notice of the rights of the defendants in error, should be fully protected according to recognized principles of equity. *Romig v. Gillette*, 187 U. S. 111; *Gillette v. Romig et al.*, 17 Okla. 324, 87 Pac. 325.

But it is contended by the plaintiff in error that Mrs. Herbert is estopped from claiming or setting up an interest in the property adverse to Wagg. The doctrine of estoppel has no application to this case, under the well-settled doctrine that a party cannot take advantage of his own wrong. In vol. 2, sec. 917, of Pomeroy's Equity Jurisprudence, it is said: "*Promptness. Delay through Ignorance of the Fraud*—The most important practical consequence of the two principles above mentioned is the requisite of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of fraud. After he has obtained knowledge of the fraud, or has been informed of

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facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy. To this rule there is one limitation. It applies only when the fraud is known, or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time." And in section 918 of the same work, it is said: "*Persons against whom Relief is Granted.* The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. 'A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud.'" In discussing the question of acquiescence and lapse of time, Mr. Pomeroy, in section 965, lays down the following doctrine: "A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term 'acquiescence' is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is that

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a party, having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that *mere* delay, mere suffering time to elapse without doing anything, is not acquiescence, although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is a distinct ground for refusing equitable relief either affirmative or defensive. An acquiescence is thus a recognition of and consent to the contract or other transaction as existing; the requisites to its being effective as a bar are knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action. A conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

It will thus be seen that the question of laches, acquiescence, and estoppel are dependent upon its own circumstances, and whether they must exist we must determine that question from all the facts and circumstances involved in the controversy; and, again, upon this issue the court having found in favor of the plaintiffs and against the defendant, and such finding being sustained by sufficient evidence and in harmony with the settled doctrines of equity jurisprudence, such findings of fact are conclusive upon

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this court. Nor do we think there was any error in admitting or excluding any material or competent testimony in the course of the trial. If it was error to admit the memorandum on page 58 of the record, it was clearly harmless and could not have affected the result of this case, and it is to be presumed that the court, sitting as a chancellor, only considered material, competent, and relevant testimony in making up its findings and rendering the decree in this case. Nor was there any error in rendering the decree in the case.

It follows that the court, upon the evidence and laws of this case, rightfully found the issue in favor of the plaintiffs and against the defendant, and decreeing that the deed executed on May 28, 1901, was a mortgage. The judgment of the district court of Pawnee county is affirmed.

Burford, C. J., who presided in the court below, not sitting; Pancoast and Garber, JJ., absent; all the other Justices concurring.

J. O. SEVERNS v. F. M. ENGLISH, *Receiver*.

(Filed October 12, 1907.)

1. **RECEIVERS—Possession of Property—Supervision of Court.** Courts of equity have the power to appoint receivers, and to order them to take possession of property in controversy and to enjoin interference with the possession of the receiver, whether in the immediate possession of the defendant, or his agent, and in proper cases may order the agent or employees of defendant, though not parties to the record, to deliver the specified property to the receiver.
2. **INJUNCTION—Granted Pendente Lite—Discretion of Court.** The granting of temporary injunctions *pendente lite* is largely within the discretion of the court, and appellate courts will not vacate such orders on appeal unless there has been a clear abuse of discretion, or the same is granted without authority.

(Syllabus by the Court.)

J. O. Severns v. F. M. English.

Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Affirmed.

Ross & Anderson and Cotteral & Hornor, for plaintiff in error.
Parmenter & Myers, for defendant in error.

STATEMENT OF THE CASE.

The history of this case is as follows: An action was pending in the district court of Comanche county, entitled Broe v. Hale, for an accounting, wherein the title, right of possession, and earnings of certain personal property, including the subject-matter of this suit, to-wit, a certain ditcher, was involved. The plaintiff was appointed receiver in that action, duly qualified, and was by the court ordered to take possession of said personal property, including the said ditcher. In the petition in this case, the plaintiff alleges: that on March 31, 1905, he was appointed receiver in an action wherein Geo. W. Broe was plaintiff and J. R. Hale was defendant, and was directed therein to take charge of, control, and manage under the orders of the court a Buckeye ditcher, owned by said Broe and Hale, and being used in the digging and the excavating of the sewer system at Lawton. And to perform certain other duties as shown in order of appointment, which said other duties are stated as follows: "To control and preserve the same until the final determination of the above-entitled action, or until otherwise directed by the court"; that Hale had delivered the ditcher to defendant Severns by virtue of an agreement between Severns and Hale, whereby Severns was to make certain repairs on the ditcher for which consideration Severns was to retain possession of the ditcher as security thereof; that at such time, or while Severns had possession of the said ditcher, Hale agreed with Severns that Severns was to retain said ditcher as a pledge for the payment of certain moneys advanced by Severns to Hale; that Hale and Severns had made another agreement, whereby Severns was to use said Buckeye ditcher in excavating and digging the

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trenches of said sewer system, and after he had done said work was to account to said Hale for the value of the work done by said ditcher and to return the ditcher to Hale; that for a period of some weeks Severns had been using said ditcher in the excavation of the trenches, and that Severns, after demand, had refused to deliver the ditcher to the plaintiff English; that Severns claims a right to the possession of the ditcher by virtue of having received the same from said Hale; that said Severns is using said ditcher in excavating said sewer trenches, and has broken and injured the machinery; that the trenches so being dug are through ground exceptionally hard and difficult of excavation, and in many instances deep, and the machine is being wrenched and broken, and deteriorating in value to the irreparable injury of the assets the plaintiff is appointed to take charge of; that the exact amount of money advanced by said Severns to said Hale on the ditcher, in making said repairs, and the amounts of money advanced for which said Severns is holding said ditcher as security, are unknown to plaintiff, because Hale and Severns are ignoring the rights and interests of plaintiff, and will not and have failed to inform the plaintiff of the amount advanced to Hale, or the amount claimed as a lien upon the ditcher for repairs; that ever since the institution of the suit of *Broe v. Hale*, ninety days or more, and ever since plaintiff's appointment as receiver, defendant Severns has had possession of the ditcher and used and controlled the same; that plaintiff is entitled to an accounting from Severns for the value of the use of the ditcher, that said value of the use of same cannot be given by plaintiff because he is wholly and entirely excluded from knowledge of the amount of work done, or the exact period of time the ditcher has been used by defendant, but plaintiff alleges it to be \$2,000.00; that the ditcher has deteriorated \$500.00; that it is worth \$5,000.00, is an expensive and complicated piece of mechanism; that it has been by such use damaged \$500.00; that defendant Severns has, at all of the times mentioned, known of the rights of Broe in and to the ditcher, and

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that the rights claimed by Severns to the ditcher and his agreement with Hale were with notice of Broe's interests; that Severns is not attempting or taking any steps to enforce any lien against the ditcher, but is using the agreement as a screen behind which he can retain the use, management, and control of the ditcher, to the exclusion of every right and interest of the plaintiff receiver; that Severns is a non-resident of Comanche county, and has no property in said county, except possibly a very meagre amount of personal property; that by retaining said machine Severns is defrauding, cheating, and depriving plaintiff of his rights and interests therein; that by reason of the above and foregoing fact, and the numerous claims of Severns against the ditcher, the plaintiff has no adequate remedy, at law, and that an irreparable injury is being done the ditcher and the interest of the plaintiff therein.

The prayer of the petition is for an order restraining defendant Severns and his agents and employees from exercising any control over the said ditcher, directing Severns to turn the ditcher over to the plaintiff pending the final disposition of the cause and the case of *Broe v. Hale*; that an accounting be had between the receiver and Severns for the value of the use of the machine, and that the plaintiff receiver have judgment against Severns for damages to the machine in the sum of \$500.00, and for the value of the use of the machine in the sum of \$2,000.00, for costs, and all other relief plaintiff is entitled to. A summons was regularly issued out of the district court, served upon the defendant, and regularly returned. An order was obtained from the judge of the district court in chambers, in words and figures, as follows, omitting the caption and names of parties:

"The above entitled cause comes on to be heard before the undersigned, judge of the district court in and for the aforesaid county and territory at my chambers at Hobart, Oklahoma, on motion and affidavit of the plaintiff as receiver, for an order directing, commanding, and ordering J. O. Severns, the defendant, to deliver and turn over to F. M. English, receiver, one cer-

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tain Buckeye ditcher, now being used and operated by said defendant in excavating the trenches for the Lawton sewer system, in the city of Lawton, Comanche county, Oklahoma, and further praying that said J. O. Severns, his agents, servants, and employees be restrained from further using, managing, or operating the aforesaid Buckeye ditcher.

"It is therefore, by the court, after being duly advised in the premises, ordered, adjudged, and decreed that the said J. O. Severns do forthwith deliver and turn over to the said F. M. English, receiver, the aforesaid Buckeye ditcher, now being used, operated, and controlled by said Severns, his agents, servants, and employees, and he is hereby directed and ordered by the court to deliver the aforesaid Buckeye ditcher to the aforesaid F. M. English, receiver.

"It is further ordered, adjudged, and directed by the court that the said J. O. Severns, his agents, employees, and all persons acting for him during the pendency of this action, be, and they are each and all of them hereby restrained from any and all further use and management of the said Buckeye ditcher.

"This order and injunction to be and remain in full force and effect from the time of its signing until such time as the J. O. Severns shall make, execute, and deliver to Geo. W. Broe a good and sufficient bond in the sum of five thousand dollars (\$5,000.00), the same to be approved by the clerk of the district court, at Comanche county, Oklahoma, and conditioned and in compliance with one certain order made by this court in the case of *Geo. W. Broe, plaintiff, v. J. R. Hale, defendant*, pending in the district court of Comanche county, Oklahoma, wherein this plaintiff, F. M. English, was appointed as a receiver to take charge of and control and manage the aforesaid Buckeye ditcher, under the direction and control of the court. Said bond shall be conditioned to pay the judgment rendered in favor of *Geo. W. Broe v. John R. Hale*, as aforesaid, in aforesaid cause.

"The order of injunction herein to be in force only after giving good and sufficient bond in the sum of \$2,500 by plaintiff to defendant, conditioned that plaintiff will pay defendant any damage sustained, if it be finally determined that the order of injunction herein is wrongfully granted.

"Done at Hobart, Kiowa county, Oklahoma, on this 12th day of April, 1905.

"F. E. GILLETTE, Judge of District Court."

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Endorsed: "Filed April 12, 1905, N. E. Sisson, Clerk, by L. S. ECKLES, Deputy."

Afterwards, on the 13th day of April, 1905, the defendant filed his motion to vacate said order, which motion is as follows, omitting the caption and title:

"Comes now the said defendant and specially excepts and objects to the orders made by the honorable judge herein, on the date of April 12, 1905, at chambers, and moves the said honorable judge to set aside and vacate the said orders, and each of them, for and upon the following grounds and causes, to-wit:

"1st. Said order and each of them are contrary to law and without authority of law. 2nd. Said orders and each of them are without jurisdiction, both as to the parties to this cause and the subject-matter involved. 3rd. Said orders and each of them are contrary to facts and to the rights of defendant and based upon insufficient grounds or reasons. 4th. Said orders and each of them are contrary to law in this: That they were made without notice of any kind or character to defendant or counsel. 5th. Said orders and each of them are invalid and contrary to law in this: That the plaintiff has and had a plain and adequate remedy at law, and for such cause had no right to pursue or obtain any remedy or relief in equity. 6th. Said orders and each of them are invalid and contrary to law in this: That they determine the merits of such action without notice or opportunity on the part of the defendant to be heard or have his day in court. 7th. The petition of the plaintiff fails to state facts sufficient to constitute a cause of action against defendants, or to entitle the plaintiff to the relief sought, or to any orders or relief herein. 8th. The plaintiff has no legal capacity or jurisdiction to sue or maintain this action in this: That he has not furnished or given a bond as receiver which has been considered or approved by the court or the honorable judge thereof. 9th. The allegations and statements contained in plaintiff's petition are untrue in fact, and the said orders are a mistake both of law and fact. 10th. The said orders are without jurisdiction or authority of law in this: That they constitute a mandatory injunction.

"Wherefore the defendant prays the honorable judge to set aside and vacate the said orders and each of them, and that the plaintiff be directed to immediately deliver said Buckeye ditcher

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mentioned in the plaintiff's petition to the said defendant, and relinquish the same to the defendant, and that the defendant be restored to all of his rights and placed in the same position as before said orders were made, and that he have all other just and proper orders in the premises.

"The said plaintiff and his attorneys are hereby notified of the foregoing motion, and that the same will be called up and presented for determination to the Hon. F. E. Gillette, judge of said court, in chambers, at Hobart, Kiowa county, O. T., on the 14th day of April, A. D., 1905, at the hour of 8 o'clock P. M., or as soon thereafter as the same can be heard, and that the defendant will at such time offer and submit affidavits, documents, and oral evidence in support of said motion.

"ROSS & ANDERSON, Attorneys for Defendant."

"Acknowledgment of service.

"Service of the foregoing motion and notice by a true copy is hereby acknowledged to have been made on us this 13th day of April, 1905.

"PARMENTER & MYERS, Attorneys for Plaintiff."

Endorsed: "Filed this 13th day of April, 1905, N. E. Sisson, Clerk, by L. S. ECKLES, Deputy."

On the 14th day of April this cause came on to be heard before the judge at his chambers, on the motion of defendant to dissolve the injunction, which motion was by the court granted, and the injunction ordered on the 12th of April, 1905, was by the court vacated. Thereafter, and on the 15th day of April, 1905, the court having made and entered an order approving and confirming the bond of F. M. English as receiver in the case of *Geo. W. Broe v. J. R. Hale*, the plaintiff asked and was given leave to re-file his motion and affidavit for injunction, and re-filed his petition in this cause, as of date April 15, 1905. Thereupon, on the 15th day of April, 1905, said cause came on to be further heard upon the application of plaintiff for temporary injunction on the petition and affidavit of said plaintiff as re-filed, and the court, after hearing said application, made the following order, omitting the caption and title:

"The above-entitled cause coming on to be heard before the

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undersigned, judge of the district court in and for the said county and territory, at my chambers at Hobart, Oklahoma, on this 15th day of April, 1905, on motion and affidavit of the plaintiff as receiver for an order directing, commanding, and ordering J. O. Severns, the defendant, to deliver and turn over to F. M. English, receiver, one certain Buckeye ditcher, now being used and operated by said defendant in excavating the trenches for the Lawton sewer system, in the city of Lawton, Comanche county, Oklahoma, and further praying that said J. O. Severns, his agents, servants, and employees be restrained from further using, man-aging, or operating the aforesaid Buckeye ditcher.

"It having been made to appear that heretofore to-wit, on the — day of March, 1905, in an action pending between Geo. W. Broe and J. R. Hale, in the district court of Comanche county, O. T., wherein the title to the said Buckeye ditcher was involved as between said parties, that the plaintiff herein, F. M. English was appointed receiver of the said property, and was by order of the court directed to take possession of the same and hold keep, and preserve the same until the matters in dispute between said Broe and said Hale were settled by judgment of the court, upon the said F. M. English giving a good and sufficient bond as receiver in the sum of two thousand and five hundred dollars (\$2,500.00).

"It having been made further to appear that said F. M. English, plaintiff herein, has duly qualified as such receiver, and has given the bond required, which has been duly and law-fully approved, and as such receiver has demanded possession of said Buckeye ditcher, but that possession of the same has been re-fused him by one J. O. Severns, the defendant herein, he, the said Severns, claiming to hold the said ditcher under and by authority of the said J. R. Hale, and the right, by virtue of such authority to conduct, operate, and use the same to the exclusion of Geo. W. Broe and this plaintiff, as receiver, and has failed and refused to account for the earnings and proceeds of the same in accordance with a certain contract between said Broe and said Hale, by the terms whereof the earnings of the said ditcher as stipulated in said contract was to be paid to said Broe until the cost price of said ditcher had been reached.

"It having been further made to appear that the said J. O. Severns, defendant herein, received possession of said ditcher from

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said Hale, with the knowledge of the terms and requirements of the contract between said Broe and said Hale, and with the full knowledge of the rights of the said Geo. W. Broe, with reference thereto.

"It is therefore by me considered, ordered, and adjudged that the said J. O. Severns do and he is hereby commanded forthwith to deliver and turn over to the said F. M. English, receiver as aforesaid, said Buckeye ditcher, now being used, operated, and controlled by him, and he, his agents, servants, and employees are hereby restrained and enjoined from further use, control, or custody of said ditcher, except and unless the said J. O. Severns shall enter into a good and sufficient bond in the sum of \$5,000 to be approved as required by law, conditioned that upon a final accounting between said Broe and said Hale, under said contract, he will pay to said Broe, according to the terms of said contract, the amount found due for the use of said ditcher under and by virtue of the terms of said contract, to-wit, the earnings of said ditcher in the construction of the Lawton, O. T., sewerage system.

"It is further ordered and adjudged that this order shall not take effect and be in force until the plaintiff herein shall give to the said defendant, Severns, a good and sufficient bond, in the sum of two thousand five hundred dollars (\$2,500.00), conditioned that he will pay to the said J. O. Severns the damages by him sustained, if it be finally determined that the injunction herein was wrongfully ordered and granted.

"Witness my hand, at my chambers, this 15th day of April, 1905.

"F. E. GILLETTE, Judge, 7th Judicial Dist. Okla.

"To the granting of which orders the defendant excepts and objects. Exceptions allowed. F. E. Gillette, Judge. And thereupon, for good cause shown, the defendant was allowed ten days in which to make and serve case-made for the supreme court, and the said plaintiff was allowed one day thereafter in which to suggest amendments thereto, said cause to be settled and signed on two days notice by either party to the adverse party.

"F. E. GILLETTE, Judge District Court."

Opinion of the court by

IRWIN, J.: Fours grounds are alleged by counsel for plaintiff in error for a reversal of this case. They are as follows:

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"1. The plaintiff had a plain and adequate remedy at law for the purpose of obtaining possession of the ditcher, namely, by a replevin action, if he was entitled to the possession thereof, and for this reason he had no right to the equitable remedy pursued, namely, by mandatory injunction.

"2. Regardless of the character of his remedy, and even if a remedy existed in equity, still there was no sufficient basis or authority for relief in the case by a mandatory injunction.

"3. If there was a remedy given the plaintiff by injunction, the order of injunction is erroneous and invalid, because the bond required of the plaintiff to obtain the injunction was not to be conditioned as provided by law, in this, that it was not to contain any stipulation for attorney's fees prescribed by the act of the Oklahoma legislature, approved March 15, 1905 (Session Laws, 319-320).

"4. The bond required of the defendant was an unlawful burden and condition upon which to obtain a stay of the order, for the reason assigned in the last paragraph, and also because not authorized by any law or precedent, and contrary to law."

It will be noticed that the first three assignments of error are based on the theory that there was a mandatory injunction improperly issued in the case. This contention we think is not well taken, as a reading of the order of the court will show that the only purpose of the injunction part of the order was in aid of and to give force and effect to the order compelling the turning over of the property to the receiver, that it might by him be preserved and accounted for in such a manner as the further order of the court might require. An examination of the record will show that all the court did or attempted to do was to make an order directing that the property in litigation between the parties be turned over to the receiver pending the final disposition of the case. This he had a perfect legal right to do, and he had the right to make all necessary restraining orders as might be necessary to give force and effect to such order. By referring to the journal entry in this case, on page 31, it will be seen that the only restraining condition in the order is in the following language: "He [Severns], his agents, servants, and employees are

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hereby restrained and enjoined from further use, control, or custody of said ditcher." And to guard all parties against injury or loss by this part of the order, a good and sufficient bond is provided for. Such orders are necessary for the proper discharge of duty on the part of the receiver, and are clearly within the necessary powers of the court.

In the case of *Ex Parte Cohen*, 5 Cal. 494, it is said:

"Courts of equity have the power to appoint receivers and to order them to take possession of property in controversy, whether in the immediate possession of defendant or his agent; and in proper cases they can also order the defendant's agents or employes, although not parties to the record, to deliver the specific property to the receiver."

And in *Wikle v. Silva*, 70 Ga. 717, it is said:

"Title to property should not be tried in a summary proceeding for interference with the custody of a receiver, but possession only may be put in issue in such a manner."

In *Naddox v. Tidwell*, 96 Ga. 783, 22 S. E. 390:

"It was proper, on appointing a receiver for an insolvent firm, to require one of the firm's co-defendants, who it was shown had taken property of the firm, to return that property to the receiver, or give a bond conditioned to pay the value thereof to the petitioners in case the receiver was found to be entitled to the property on final hearing."

It the court did not have power to make and enforce such an order, the appointment of a receiver in many cases would be but an idle farce. The granting of a temporary injunction *pendente lite* is largely within the discretion of the court, and the appellate court will not vacate such an order on appeal, unless there has been a clear abuse of discretion, or the same was granted without authority. *Reaves v. Oliver*, 3 Okla. 62. We think the record shows there was no abuse of discretion, but only a reasonable and necessary exercise of it. We are at a loss to see how it can be seriously contended that any reversible error has been committed in this case. No person can be injured by this

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order, or any substantial rights lost. The order only provides that the property should be turned over to the receiver to await the further order of the court where and when the rights of all parties can be adjusted and amply protected.

The only remaining assignment is the fourth. That is that the bond required of the defendant by this order, in order to stay that portion of the order which required him to turn over the ditcher to the receiver, was unwarranted, and was an unlawful burden upon him. We think there is no doubt, under the law, that where the court has jurisdiction of the parties and the subject-matter, and has appointed a receiver to take charge of and manage and control the personal property involved in litigation, pending such litigation, as an inherent power he has the right to order any party to the litigation to turn over to said receiver any property involved in the litigation in his possession, pending such litigation. Now, if the court had this power, then the mere fact that connected with this order is a condition that the person to whom this order is directed may stay its operation upon filing a bond is not an abuse of this power, and is not exceeding the authority of the court. Such a condition attached to the order would be for the benefit of the party against whom the order is made. The original order being allowable in this court, and being one which the court has a right to make, the party against whom such order was directed should obey the same, and the fact that the court gave him an alternative between obeying the order and securing a stay of the enforcement of the same by a bond would not render the order invalid.

These are the only assignments of error urged by counsel for plaintiff in error, and having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, at the costs of the plaintiff in error.

Gillette, J., who presided in the court below, not sitting; all the other Justices concurring.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. E. F.
MITCHELL.

(Filed October 12, 1907.)

1. **APPEAL—Review—Question of Fact.** Where the evidence, as contained in the record, reasonably tends to support the findings of the jury, this court will not disturb such findings on a question of fact.
2. **PLEADING—Allegation of Agency—Insufficiency of Denial.** Where the allegations of the petition set up the authority of the agent, a plea denying this authority which is not in conformity with section 4318 of Wilson's Statutes, and does not bring the plea within any of the grounds therein provided, is not sufficient to raise the issue of authority.

(Syllabus by the Court.)

Error from the District Court of Comanche County; before F. E. Gillette, Trial Judge.

Affirmed.

M. A. Low, Blake, Blake & Low, and W. C. Stevens, for plaintiff in error.

J. L. Hamon and Chas. Mitschrich, for defendant in error.

STATEMENT OF FACT.

This was an action commenced in the district court of Comanche county on the 26th day of September, 1902, to recover from the defendant damages for the breach of a certain contract set forth in the petition of plaintiff. By the terms of the petition it is alleged: That the defendant was a railway corporation, and during and between the 15th of July, 1901, and the 15th of August, 1901, E. W. Thompson was its assistant general passenger and transfer agent west of the Missouri river, and as such agent had authority to make the contract set out in the petition. That on July 28, 1901, the said company, through its said agent, entered into a contract with the plaintiff to establish a bus and trans-

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fer line between Fort Sill and Lawton and the town of Marlow, said town of Marlow being the nearest point on the railway of said company to Fort Sill and Lawton, the company at that time not having adequate facilities for transporting passengers from Marlow to Fort Sill and Lawton. That by the terms of said agreement and contract so made by the agent of the company with the plaintiff the said company was to transport from Kansas City, Missouri, to Marlow, I. T., such wagons, harness, mules, and equipments as might be necessary for the purpose of carrying out the contract and establishing a bus and transfer line from Marlow, I. T., to Fort Sill and Lawton, Oklahoma, the same to be conveyed by the company free of charge; that is, the plaintiff in the first instance was to pay the freight, and it was to be remitted to him by the company. That in pursuance of said contract the plaintiff purchased at a large expense mules, wagons, harness, and equipments necessary for the carrying out of said contract, delivered them to the company, which, under the terms of the contract, was to be sent by the company in one train as expeditiously and rapidly as possible from the point of shipment to the point of destination. That when the mules, wagons, harness, and equipments was so purchased by the plaintiff, he delivered the same to the company's agent at Kansas City, Mo., and notified them of the necessity for immediate shipment and continuous rapid transportation, and that, notwithstanding such notice and the terms of said contract, the plaintiff failed, neglected, and refused to send the said equipments through in one train, or with reasonable dispatch, but divided the same into different trains delayed the shipment unnecessarily, and consumed much more time than was reasonable in the shipment of the said mules, wagons, harness, and equipments, in consequence of which the animals became badly damaged, emaciated for want of food, sick, injured, and some of them died. That plaintiff, at the time of delivering said shipment to said company, paid the charges for such shipment. That, in consequence of the negligent manner of

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the shipment and delay unnecessarily occasioned thereby, the plaintiff was injured, in this: That he was unable to establish his bus and transfer line between Marlow and Fort Sill and Lawton, and many passengers who were there to be transported, and who had the necessary funds to pay the regular fee of \$2.00 each way, were prevented from being accommodated and the plaintiff thereby lost the profits of said business. That by the loss occasioned by the emaciated condition of his animals, the loss of certain animals and the loss and damage to business, he has been injured in the sum of one thousand dollars, for which he brings this suit. To this petition the defendant filed an answer admitting that it was a corporation, as alleged in the petition, and that E. W. Thompson was on the day stated in the petition the assistant general passenger and transfer agent of the company; but alleged: That Thompson had no authority to make, either as general agent of the company or in any other capacity, and did not make, the agreement with the plaintiff set out in the first cause of action in the petition; that the company did, under contracts, at the time stated in the petition, transport the mules, wagons, and oats over the company's line from Kansas City to Marlow; and alleged that such transportation was done under the provisions of written contracts which were attached as Exhibits A, B, and C, and that such contracts were the only contracts between the parties, and that it had duly complied with all the provisions of the contract on its part; said answer having the following verifications:

"Territory of Oklahoma, Canadian County, ss.:

"C. O. Blake, being duly sworn, on oath states that he is attorney for the above named defendant; that said defendant is a corporation, and that the statements contained in the foregoing answer are true, as affiant is informed and verily believes.

"C. O. BLAKE.

"Subscribed and sworn to before me this 4th day of March, A. D., 1904.

"JOHN LIVINGSTON, Notary Public."

The plaintiff replied with a reply of general denial. Cause was

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tried to a jury, and judgment rendered in favor of the plaintiff. Motion for new trial was filed in due time, overruled, and exceptions saved, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: A reversal of this case is asked for on three grounds: First, the evidence does not support the allegation that a contract was actually made. This is purely a question of fact, and there is evidence in the record for and against the proposition. To say the least, it is conflicting, and we are not prepared, on an examination of the record, to say that the evidence does not reasonably tend to support the findings of the jury, and, under the well-recognized and oft-repeated rule of this court, the verdict of the jury will not be disturbed by this court for this reason. Second, The authority of the agent making the contract to bind the company is not shown. The question presented by this contention is: Was E. W. Thompson, the A. G. P. & T. A. of the company, authorized to make the contract sued on?

Wilson's Revised Statutes, sec. 4312:

"In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correction of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

Section 4314:

"If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. When a municipal or other corporation is a party, the verification may be made by an officer thereof, its agent or attorney."

Section 4318:

"When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: First. When the facts are within the personal knowledge of the agent or at-

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torney. Second. When the plaintiff is an infant, or of unsound mind, or imprisoned. Third. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. Fourth. When the party is not a resident of, or is absent from the county."

It will be noticed that section 4318 follows both of the other sections quoted, and seems to apply equally to both. There is nothing in this language which seems to make any distinction between a party (natural person) and a party (corporation), nor from which any intention to make a distinction can be inferred. The word "party", as used in these sections, evidently means party to the suit, regardless of whether a natural person or a corporation, and it was necessary for the legislature to provide some means of verification by some direct representative thereof, which they did by providing that in case a corporation was a party the verification might be made by an officer thereof, its agent or attorney, and there is nothing in the language of the act which exempts a corporation from the general rule laid down in section 4318, that when made by an agent or attorney it must set forth the reason why it is not made by the party himself, which must be stated in the affidavit for verification; and section 4314 does not in our judgment add any additional reason for verification by agent or attorney (that defendant is a corporation), but simply provides who shall be the direct representative of the corporation for the purpose of making the affidavit, but permits the same to be made by its agent or attorney upon the same terms and subject to the same rules and restrictions as are imposed on natural persons.

This seems to be the view taken by the supreme court of this territory in the case of *County Commissioners v. Isenberg*, 10 Okla. 380, where this court says:

"Now, it seems to us that a fair construction of this section would mean that some reason must be given by said affidavit why it is not signed by the party or the proper officer; that is, some showing should be made that this affidavit falls within one

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or the other of the four classes set forth in the section, because, unless it does, the agent or attorney has no authority to verify such an affidavit. Now, in this case the verification of the plea denying this account is signed and sworn to by the attorney. No reason is given why it is not signed and sworn to by the proper officer; no attempt is made to bring it within any one of the four classes or sub-divisions mentioned in section 3992 (section 4318, Wilson's Statutes) of the statute. This being true, this verification comes far short of meeting the requirements of the statute, and hence must be held as no verification at all, and, under the provisions of section 3986 (section 4312, Wilson's Statutes), the correctness of the plaintiff's account must be taken as true."

Now, this decision of the supreme court of this territory seems to be the settled law upon this proposition, as the same has never been overruled, modified, or changed, and we feel that it is the duty of the court to follow the rule there laid down, notwithstanding the serious criticism made upon this decision by the attorneys for the plaintiff in error. We have examined their brief on this subject, and find no new authorities cited, but simply a re-citing of the same authorities that were presented to the court in the case of *County Commissioners v. Isenberg, supra*.

There is one feature of plaintiff in error's brief on this subject that we do not think should be allowed to pass unnoticed, and that is where they make an unauthorized and unusual statement in their reply brief, to-wit: "This construction of the statute would fill the cup of joy of—— and —— to the brim—" referring to two attorneys having no apparent connection with this case, We have searched the entire record and can find nothing therein which directly or indirectly connects these gentlemen with the case. These gentlemen, so far as the record discloses, have no interest in the case, and have taken no part in it in any way, and we are at a loss to know how counsel for plaintiff in error could so far forget their duty as attorneys, and transgress the rules of professional ethics to the extent of dragging their names into this brief for the purpose of casting aspersions or making reflections against them. We think it is hardly the proper place, in

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a brief addressed to the supreme court of this territory to indulge in slurs, inuendos, or abuse, and an attorney who will indulge in any such practice is certainly unmindful of his duty as an attorney, and forgetful of the proprieties that should be observed by him as a gentleman, and for that reason we here and now desire to put the seal of our condemnation upon such practice, and warn the attorneys that it will not be tolerated in this court.

Under the rulings of this court in the case of *County Commissioners v. Isenberg*, which we believe to be the settled law upon the subject, we think the authority of the agent making this contract is confessed by the pleadings.

The only remaining assignment of error is that the court erred in his instructions to the jury. We have carefully examined these instructions, and believe that in view of the law as here laid down the instructions correctly stated the law.

Finding no substantial error in the record, the judgment of the district court is affirmed, at the costs of the plaintiff in error.

Gillette, J., who presided in the court below, not sitting; Pan-coast and Garber, JJ., absent; all the other Justices concurring.

UNITED STATES AND T. E. GIBSON V. CITIZENS TRADING CO.

(Filed November 14, 1907.)

(93 Pac. 448.)

PUBLIC LANDS—Review in Equity—Decisions of Land Department.

Courts of equity will always interfere to prevent injustice and wrong after the matter has been finally determined in the land department, when there has been a manifest misapplication of the law to the facts found by such department.

(Syllabus by the Court.)

Error from the District Court of Pawnee County; before Bayard T. Hainer, Trial Judge.

Affirmed.

E. W. King, for plaintiff in error.

John Embry, for the United States.

Dale & Bierer, for defendant in error.

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STATEMENT OF THE CASE.

This is an action brought in the district court of Pawnee county to declare a resulting trust to recover five lots in the townsite of Pawhuska, of which plaintiff below, defendant in error here, claims it had the preference right to purchase under the act of congress of March 3, 1905, relative to the sale of the Pawhuska townsite, by reason of having permanent improvements thereon, under the terms of that act. The character of the improvements is specifically set out in the petition. The defendant, in his answer and cross-petition, admitted the facts stated in plaintiff's petition to be true, but claimed that the improvements were not, in law, of the substantial character required by the instructions of the department. Both parties made motion for judgment on the pleadings. Motion of plaintiff below was sustained. Judgment rendered in favor of plaintiff, exceptions saved, and the case is brought here for review.

Opinion of the court by

IRWIN, J.: The act of congress of March 3, 1905, is as follows (omitting the caption):

"That there shall be created an Osage townsite commission consisting of three members, one of whom shall be the United States Indian agent at the Osage agency, one to be appointed by the chief executive of the Osage tribe, and one by the secretary of the interior, who shall receive such compensation as the secretary of the interior may prescribe, to be paid out of the proceeds of the sale of the lots sold under this act.

"That the secretary of the interior shall reserve from selection and allotment the south half of section four and the north half of section nine, township twenty-five north, range nine east, of the Indian Meridian, including the town of Pawhuska, which, except the land occupied by the Indian school buildings, the agency reservoir, the agent's office, the council building, and the residences of agency employees, and a twenty acre tract of land including the Pawhuska cemetery, shall be surveyed, appraised, and laid off into lots, blocks, streets and alleys by said townsite commission under rules and regulations prescribed by the secre-

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tary of the interior, business lots to be twenty-five feet wide, and residence lots fifty feet wide, and sold at public auction, after due advertisement to the highest bidder, by said townsite commission, under such rules and regulations as may be prescribed by the secretary of the interior, and the proceeds of such sale shall be placed to the credit of the Osage tribe of Indians: Provided, that said lots shall be appraised at their real value, exclusive of improvements thereon or adjacent thereto, and the improvements appraised separately. And provided further, that any person, church, school, or other association in possession of any of said lots, and having permanent improvements thereon shall have preference right to purchase the same at appraised value, but in case the owner of the improvements refuses or neglects to purchase the same, then such lots shall be sold at public auction at not less than the appraised value, the purchaser at such sale to have the right to take possession of the same upon paying the occupant the appraised value of the improvements."

An examination of this record will disclose that the improvements upon which the occupant claims a preference right of purchase of the lots in controversy were of a permanent character. This fact is clearly set forth, and an accurate and particular description of the kind and character of the improvements is set up, in the petition, and the facts are expressly admitted by the answer. This leaves no question as to the improvements being of a valuable and permanent character. This leaves nothing for the court to consider but the question of a misapplication of the law to the facts, and brings the case clearly within the class of cases of which courts of equity should and will take cognizance. *King v. Thompson*, 3 Okla. 644; *Paine v. Foster*, 9 Okla. 214; *Moore v. Robbins*, 96 U. S. 530.

The improvements in this case being conceded to be lasting, permanent and valuable, there can be no room for doubt but that the townsite board misapplied the law to the facts; and hence the decision of the district court was right and should be affirmed, which is accordingly done, at the costs of the appellant.

Hainer, J., who presided in the court below, not sitting; Hancock, J., absent; all the other Justices concurring.

Board County Commissioners of Garfield Co. v. Charles V. Porter *et al*

OPINIONS PER CURIAM.

BOARD OF COUNTY COMMISSIONERS OF GARFIELD COUNTY v.
CHARLES V. PORTER *et al*.

(Filed September 5, 1907.)

(92 Pac. 153.)

*Error from the District Court of Garfield County; before James
K. Beauchamp, Trial Judge.*

Dismissed on authority of No. 1,996, as per stipulation of parties.

Daniel Huett, Co. Att'y, for plaintiff in error.

R. L. Denton, for defendant in error.

PER CURIAM: This cause involves the same question of law presented in cause No. 1,996, between the same parties, decided at this term (reported in this volume and in 92 Pac. 152). The record is in the same condition, and the same order must be entered.

It is ordered that the appeal be dismissed at the costs of the plaintiff in error.

Geo. W. Mouldin v. L. M. Rice *et al.*

GEORGE W. MOULDIN v. L. M. RICE, S. T. RICE, AND ESTELLA
BRADFORD.

(Filed September 5, 1907.)

(91 Pac. 1032.)

VENUE—Action to Recover Real Estate—County of Defendant's Residence. By virtue of section 10 of the organic act of this territory, an action to recover the possession of real estate must be instituted in the county where the defendants or either of them reside or may be found.

(Syllabus by the Court.)

*Error from the District Court of Logan County; before Jno. H.
Burford, Trial Judge.*

Affirmed.

Devereux & Hildreth, for plaintiff in error.

Cottelal & Hornor, for defendants in error.

PER CURIAM: This was an action brought in the district court of Logan county by L. M. Rice, S. T. Rice, and Estella Bradford against George W. Mouldin, a resident of Logan county, to recover the possession of a quarter section of land situated in Garfield county, Oklahoma. To this petition the defendant interposed a demurrer, on the ground that the court had no jurisdiction of the subject-matter of the action, and because the petition failed to state facts sufficient to constitute a cause of action. This demurrer was overruled, to which action the defendant at the time duly excepted, declined to plead further, and elected to stand upon the demurrer. Thereupon the court entered judgment upon the pleadings in favor of the plaintiff and against the defendant, to recover the possession of the land, as prayed for in the petition, from which ruling and judgment the defendant brings the case here for review on a certified transcript of the record.

Geo. W. Mouldin v. L. M. Rice *et al.*

There was no error in overruling the demurrer to the petition, since the court had jurisdiction of the subject-matter of the action, and the petition stated facts sufficient to constitute a cause of action for the recovery of real estate under our code. On the question of jurisdiction of the subject-matter of the action, the case of *Burke v. Malaby*, 14 Okla. 650, 78 Pac. 105, is decisive, in which case it was held that:

"An action affecting an interest in real estate in this territory, where the real estate is situated in one county and the defendant resides in a different county, must be instituted in the county where the defendant resides."

In this case the defendant resided in Logan county, and the right of the plaintiffs' action depended upon the interpretation of an ante-nuptial marriage contract.

We therefore hold that the court had jurisdiction of the subject-matter of the action, and that the petition stated facts sufficient to constitute a cause of action, and the defendant's demurrer was therefore properly overruled.

The judgment of the court below is affirmed.

Burford, C. J., who presided in the court below, not sitting; Irwin, J., absent; all the other Justices concurring.

LONG-BELL LUMBER COMPANY, a Corporation, v. ALBERT F. NEWELL AND FRANK M. ROSS.

(Filed September 5, 1907.)

(91 Pac. 697.)

APPEAL—Summary Dismissal—Scurrilous Brief. Where the plaintiff in error files what is designated as a brief in support of his assignment of error, and in such written argument makes an abusive, wanton, insulting, and scurrilous assault upon the judgment appealed from, and which is an inexcusable and unwarranted reflection upon the trial judge, the so-called brief will be stricken from the files, the case treated as if no brief had been filed, and the appeal dismissed for failure to comply with the rules of the court.

(Syllabus by the Court.)

Opinion of the Court.

Error from the District Court of Garfield County; before F. E. Gillette, Trial Judge.

Appeal dismissed.

W. R. Cowley, L. L. Cowley, and E. E. Chesney, for plaintiff in error.

Roberts & Curran, and W. S. Denton, for defendants in error.

PER CURIAM: This cause was tried in the district court of Garfield county, before an associate justice of this court, sitting as a district judge. During an active service of over five years upon the supreme and district bench the distinguished justice has established a record for integrity, fairness, and impartiality which is unassailable, and which will endure to his credit long after his detractors will have passed into oblivion. The plaintiff in error is the Long-Bell Lumber Company, a foreign corporation which comes into this jurisdiction by comity and suffrance, and, while seeking at the hands of this court relief from an alleged erroneous judgment, overlooks the common courtesy and amenities due from a guest in the house of his host, and makes an unwarranted, wanton, and vicious attack upon a member of his host's family. The brief filed by plaintiff in error, after citing a principle contended for, contains this statement: "If this is the law—and it indeed *is*—beyond even cavil—*is the law*, then the judgment in the case at bar simply cannot remain, is everywhere unsupported, is vicious, virulent with venom, through and through, infected and infectious, fit for that antidote for that bane spoken of by Justice Swayne in *Wood v. Carpenter*, 11 Otto (U. S.) 35, 25 Law. Ed. 808." Such insolent, discourteous, and uncalled-for denunciation of a judgment of a court of high standing, and necessarily reflecting upon the judge who rendered it, can have no place in the records of a court of justice, and not only calls for severe rebuke, but exemplary punishment. And this stranger, a guest in the house of a friend, guilty of such wanton disregard of decency, must submit to the customary treatment usual in such cases, that of being unceremoniously ejected from the household whose hospitality and gener-

Long-Bell Lumber Co. v. Albert F. Newell *et al.*

osity it has for so long enjoyed and preyed upon but at last outraged.

The case is one where defendants in error obtained a judgment against the plaintiff in error for a fraud alleged to have been committed through its attorney and agent. The trial court found that the corporation had a judgment against one Payne which was a lien upon a lot in the city of Enid. The lot was worth considerably more than the judgment. It was sold at sheriff's sale, and bid in by the corporation, and its bid assigned to the M. E. Church, South, and the church paid the amount of the bid. While proceedings were pending for confirmation of the sale, the agent sold the property to the defendants in error, who paid off the judgment held by the company against Payne, paid Payne the balance of the purchase money, and obtained a deed for the property. The agent represented that the church had paid nothing, and had no interest in the property. They relied on his representations and paid \$800 on the strength of them. In the meantime, the corporation was resisting the claim of the church, but was defeated, and the sale was ordered confirmed, and the sheriff directed to convey the property to the church. The defendants in error got nothing. The court found that the corporation received and accepted the money paid by the defendants in error to their agent, thereby ratifying his acts and binding itself by his representations made in order to induce the payment to him of said money. The judgment in this case is to reimburse the defendants in error for the amount of money paid by them to the company for his property.

The company was charged with fraud and bad faith. The court found it guilty. It denied the authority of its agent, while holding on to the fruits of his deceit. It is in no position to make wanton and vicious assaults upon our courts. It is entitled to and will receive all the rights and privileges of a citizen of our territory in the courts of our territory, but it must submit to the same rules and observe the same respect for our courts and laws as is due from our own citizens. A foreign corporation, dealing

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in lumber and building materials and occupying one of the most fruitful and profitable fields ever opened to commerce, enjoying an extensive trade with our builders and consumers, and diligent in its efforts to extend its field of operations, should be the last person to make unprovoked assaults upon the courts. In these days of the aggressions of combined wealth and the importunities of organized labor, the courts are the powerful civic regulators which stand between the two great antagonistic forces in our social and political organization, and, uninfluenced by the one and unawed by the other, compel obedience to law and deal out justice evenly and justly, and are entitled to the respect and support of all well-disposed citizens. An examination of this entire record discloses absolutely nothing to inspire, provoke, or excuse any criticism of the trial court in the proceedings had before it. There is nothing in the judgment to condemn,

This foreign corporation also comes into our court by foreign counsel, who has been permitted to appear by courtesy, and, forgetting his duty, is guilty of discourteous and unprofessional conduct in placing such a brief on file. The matter set out in the brief of plaintiff in error is improper, unwarranted, inexcusable, and reprehensible. This court cannot recognize a document containing such matters as a brief, or the filing of such, a compliance with the rule requiring a brief.

The so-called brief is stricken from the record and ordered removed from the files. And, for the reason that the plaintiff in error has failed to file a brief as required by the rules of this court, the appeal is dismissed, at the costs of the plaintiff in error.

S. C. Crossley *et al.* v. Ed. Overholser *et al.*

S. C. CROSSLEY AND J. ALLEN PERISHO v. ED OVERHOLSER, J. W. COMP, AND A. M. GUSTIN, *as the Board of County Commissioners of Oklahoma County, Oklahoma Territory.*

(Filed September 20, 1907.)

(92 Pac. 1135.)

Original Application for Mandamus.

Dismissed.

Grant Stanley, for plaintiffs.

Ledru Guthrie, for defendants.

PER CURIAM: This is an application for a writ of mandamus filed in this court by the plaintiffs on October 8, 1904. No briefs having been filed by either party in this cause, the same is dismissed in accordance with rule 6 of the rules of practice of this court. Costs taxed to the plaintiff.

TERRITORY OF OKLAHOMA *ex rel.* P. C. SIMONS, *Attorney General*,
v. WILLIAM H. DIVERS, *Mayor of Anadarko, Caddo County, Oklahoma.*

(Filed September 20, 1907.)

(91 Pac. 1134.)

Original Application for Mandamus.

Dismissed.

P. C. Simons, E. E. Grinstead, L. E. McKnight and A. T. Boys, for relator.

Carl Glitsch, and Rush & Steen, for respondent.

PER CURIAM: The petition in this case was filed in this court April 1, 1904. No briefs by either party having been filed, in accordance with the rules of this court the case is dismissed, at the costs of the plaintiff.

APPENDIX

R U L E S

FOR

Admission to the Bar

OF THE

STATE OF OKLAHOMA

Adopted by the Supreme Court, November 19, 1907

State Bar Commission

WALTER A. LEDBETTER, Ardmore, ...	CHAIRMAN
H. B. MARTIN, Perry	SECRETARY
Benjamin Elder	McAlester
George S. Ramsey	Muskogee
Thomas D. McKeown	Ada
Charles J. Wrightsman	Tulsa
Louis Davis	Lawton
Benj. F. Williams Jr.	Norman
Charles H. Parker	Enid
Nestor Rummons	Hobart
John W. Scothorn	Guthrie

Rules for Admission to the Bar of Oklahoma

Now on this, the 19th day of November, 1907, the court, having had under consideration the making and publishing of rules governing admission of applicants to the bar, and appointment of a commission of attorneys and counselors at law to aid the court in the examination of applicants for admission; it is ordered by the court that the following named attorneys and counselors at law, members of the bar of this court, be and they are hereby appointed a commission to assist the court in the examination of all applicants for admission to the bar, to wit:

First district: Benjamin Elder, McAlester; George S. Ramsey, Muskogee.

Second district: Walter A. Ledbetter, Ardmore; Thomas D. McKeown, Ada.

Third district: H. B. Martin, Perry; Charles J. Wrightsman, Tulsa.

Fourth district: Louis Davis, Lawton; Benjamin F. Williams, Jr., Norman.

Fifth district: Charles H. Parker, Enid; Nestor Rummons, Hobart.

At large: John W. Scothorn, Guthrie.

Rule 1. Except as hereinafter provided, no person shall be admitted to the bar of this court except upon examination and a certificate of the commission on examination in this court.

Rule 2. Attorneys at law eligible to practice in any court of this state under the provisions of section 33 of the schedule of the constitution may be enrolled as attorneys eligible to practice law in this court or any other court of this state by taking and subscribing to the following oath or affirmation:

I, ... do solemnly swear that I will support, protect and defend the constitution of the United States, and the constitution of the State of Oklahoma, and that I will do no falsehood, or consent that any be done in court, and if I know of any I will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; I will not wittingly, willingly

or knowingly promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; I will delay no man for lucre or malice, but will act in the office of attorney in this court according to my best learning and discretion, with all good fidelity as well to the court as to my client, so help me God.

And filing the same with the clerk of this court; and, in addition thereto, also filing with said clerk legal evidence of their admission to such court of record, as provided in said section 33 of said schedule; and, in addition thereto, evidence of their good moral character. And when the same has been done such an attorney may be enrolled as a member of the bar of this court by the clerk of said court when so directed by one of the judges of said court.

Rule 3. The following persons, if found by the commission on examination to be persons of good moral character and not otherwise objectionable, will be admitted without an examination:

A. Ex-judges of the district or appellate courts of another state, or of a territory, or of the District of Columbia.

B. Persons who have been admitted in the higher courts of another state, or of a territory, or of the District of Columbia, upon an examination, where the law of such state, or territory, or the District of Columbia requires all admissions to be in such highest court and upon examination, and who have been continually engaged in the practice of law for three years before filing application.

Rule 4. No applicant shall be admitted to the bar unless he possesses the following qualifications:

He shall be a citizen of the United States, or shall have declared his intention to become such; not less than 21 years of age; he shall be a resident of this state, and shall satisfy the commission that he is a person of good moral character; and that he has regularly and attentively studied law for the period of three years previous to his application; he shall sustain on the answers to the written interrogatories propounded by the commission an average of 75 per cent. on examinations embracing the following subjects: The Law of Real and Personal Property, Torts, Contracts, Evidence, Pleadings, Partnerships, Bailments,

Negotiable Instruments, Agency, Suretyship, Domestic Relations, Wills, Corporations, Equity, Criminal Law, Constitutional Law, and Legal Ethics; and his educational attainments shall be equivalent to those indicated by the course of study in the public high school of this state.

Rule 5. The commission shall hold an examination in the city of Guthrie on the third Tuesday in the month of January, 1908, and on the first Tuesday in the months of June and December thereafter. Examinations must be conducted under the direction of the commission, six of whom shall constitute a quorum. A majority of the members present at any examination shall report in writing for or against each applicant. Such examinations shall be conducted both orally and in writing and the written interrogatories, together with the answers thereto, shall be reported to the court with the recommendation of the commission.

Rule 6. Applicants for admission to the bar shall file their written applications with the clerk of the supreme court on blanks to be furnished by such clerk. All applications shall be filed not less than 30 days prior to each semi-annual meeting of the commission, except as to applications which are to be considered at the first session of the commission, which may be filed at any time prior to January 1, 1908. Each applicant shall also file with his application all diplomas, certificates, and other evidences of qualifications or character that such applicant may desire to submit for the consideration of the commission. No application shall be considered by the commission that has not been filed as herein provided.

Rule 7. Not less than 30 days before each examination the clerk of this court shall forward to the secretary of the commission all applications for examinations, and the secretary shall immediately make such an investigation touching the moral character of the applicant as he may think advisable, and report the information obtained to the commission, who shall take such action in passing upon the moral fitness of the applicant as they may deem proper.

Rule 8. No certificate, affidavit, or other paper produced in

conformity with these rules, or which shall be called for by the commission, shall be deemed conclusive evidence of the facts therein stated, but in all cases, the commission must be satisfied with the truth of such statements before the applicant will be recommended for admission.

Rule 9. The commission may, subject to the approval of the court, make rules not inconsistent herewith for the conduct of the examinations, which together with these rules, shall be published in pamphlet form for distribution by the commission

Rule 10. Every application for admission must be accompanied by an examination fee of \$12.00, which shall be returned to the applicant if his name is not placed on the examination roll. If his name is placed on the roll and he fails to receive a certificate of qualification, he shall not be required to pay any further sum upon a second examination. If an applicant, on examination, shall be rejected, he may be admitted to the next examination upon filing a certificate that he has studied law for a period of five months subsequent to the date of his former examination; but no one shall be admitted to more than two examinations except upon the payment of an additional examination fee of \$6.00 for each subsequent examination. Provided, persons admitted to practice under section 33 of the schedule of the constitution shall be required to pay only the sum of \$3.00.

Rule 11. An applicant, upon receiving the oath of office, shall sign a roll showing the date of his admission, his age, and place of residence.

Rule 12. The clerk shall enter the date of the filing of the papers under these rules, with a description of the same, in a record book provided for that purpose, and all sums received under these rules in a cash book, showing the date, from whom, and for what received, and shall pay the same out upon the order of the Chief Justice in payment of the expenses of the examination, and for no other purpose. That is to say: Costs of necessary printing, postage, and stationery, necessary janitor and messenger service; to the clerk of the Supreme Court for each certificate of admission issued to an applicant, \$1.00; to each mem-

ber of the commission, his necessary traveling expenses actually incurred, and \$5.00 per day as compensation for each day actually and necessarily employed in attending any session of the commission, and in going to and returning from the same, and any expenses and fees incurred in the performance of any service under the order of the court. The chairman and secretary of the commission will be allowed such additional compensation from time to time as the court may think just and proper.

Rule 13. The commission shall select from its members one commissioner who shall act as chairman, and one commissioner who shall act as secretary, and if in the judgment of the commission it is necessary and expedient, the secretary may select an assistant secretary, not a member of the commission, provided, however, that such assistant shall be paid out of any allowance that may be made by the court to the secretary.

Rule 14. If necessary for the commission to meet at any other time than as herein provided, such meeting shall be upon the order of the chairman of the commission.

Rule 15. Before entering upon the discharge of his duties each member of the commission shall take and subscribe the following oath, which shall be spread upon the records of this court:
State of Oklahoma, County of.....ss.

I, ..., having been by the Supreme Court of the state of Oklahoma appointed a commissioner to assist the court in the examination of applicants for admission to the bar of this state, do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of Oklahoma, and that I will carefully, honestly, and impartially, and to the best of my skill and ability, examine all applicants for admission to the bar, and will not recommend any one for admission whose educational and legal attainments are not equal to the qualifications prescribed by the rules of this court; and that I will not recommend any one for admission whom I do not believe to be a person of good moral character; and that I will act in the office of such commissioner in all good fidelity both to the court and to the applicant. ,

Subscribed and sworn to before me this day
of 19.....
..... Justice.

Application for Admission to Supreme Court of Oklahoma.

The undersigned hereby applies for admission to the bar of the Supreme Court of Oklahoma, and represents that he has truly answered the following questions:

- Oklahoma, ... 19.....
1. Name?
 2. Age?
 3. Oklahoma residence, and how long?
 4. Former residence?
 5. Are you a graduate of any high school, academy, college or university, or have you received a certificate from the territorial or state board of school examiners. If so, accompany this application with your diploma or your certificate, stating here the name of the school
 6. Are you a citizen of the United States?
 7. How long have you attentively studied law prior to this application?
 8. Have you ever held any judicial position? If so, what, where, and when?
 9. Have you attended any law school? If so, what school, where located, and how long did you attend? If a graduate, accompany this with your diploma, and state the length of course in such school, and when you graduated, and date of your graduation
 10. Have you been admitted to practice in the Supreme Court of any other state or territory? If so, where, when, and were you examined in that court?.....
 11. Have you been in actual practice for the past three years? If so, where?
 12. Have you ever been disbarred? If so, give full particulars.
 13. Are disbarment proceedings now pending against you?.....
 14. Have you ever been convicted of a felony?
 15. If previously admitted to any of the district courts of the territory of Oklahoma, or in any of the United States courts of Indian Territory, or any court of record of any of the Five Civilized Tribes, please state when and where, and accompany this application with your certificate of such admission.
- Applicant.
- State of Oklahoma, County of ss:
- Subscribed and sworn to before me this day of 19.....
- Notary Public.
- My commission expires 19.....
- I, ... an attorney of this court do hereby certify that I am acquainted with the applicant

..... that he is of good moral character and has regularly and attentively studied law during a period of three years previous to this application, and that I believe such applicant to be a person of sufficient knowledge and ability to discharge the duties of an attorney and counselor at law.

..... Attorney at Law.

ACTS CONCERNING THE ADMISSION OF ATTORNEYS.

. Act Approved March 4, 1903.

Section 1. No person shall be permitted to practice as an attorney and counselor at law or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, unless he has been previously admitted to the bar by order of the Supreme Court, and the court shall fix times when examinations shall take place, which may be either in term or vacation, and shall fix the examination and admission fees, and prescribe and publish rules to govern such examinations; but this section shall not apply to persons, residents of the territory, admitted under pre-existing laws.

Section 2. When a person applies to said court for admission to the bar, he shall be examined by the court touching his fitness and qualifications; and if on such examination the court is satisfied that he is of good moral character, and has a competent knowledge of the law, and sufficient general learning, an oath of office shall be administered to him, and an order shall be made on the journal that the applicant be admitted to practice as an attorney and counselor at law in all courts of record in this territory. Provided, that said court may appoint, to serve for one or more years, a commission composed of not less than five persons learned in the law to assist in such examination.

Section 3. No person shall be admitted to such examination unless he is twenty-one years of age, and is a citizen of the United States, or has declared his intention of becoming a citizen thereof; nor until he has produced from some attorney at law a certificate setting forth that the applicant is of good moral character, and that he has regularly and attentively studied law during

the period of one year previous to his application, and that he believes him to be a person of sufficient legal knowledge and ability to discharge the duties of an attorney and counselor at law; but any person residing in the territory or coming into the territory for the purpose of making it his permanent residence, upon producing satisfactory evidence that he has been regularly admitted as an attorney and counselor at law in some court of record within the United States, may be admitted to practice law in this territory upon producing a certificate of a court of record showing his admission to practice therein, and showing that he has not been disbarred.

Section 4. In any county in which there is a law college, or a college or university having a department of law, duly organized, the Supreme Court shall, on an application in writing signed by the president of the faculty of such college or department, appoint a committee of not less than five attorneys at law to attend the commencement exercises of such college next after their appointment, and examine such graduates of such college or department as present themselves for examination in reference to their qualifications to practice law; and the certificate of such committee, or a majority of them, that in their opinion any of such graduates are persons of sufficient legal knowledge and ability to discharge the duties of an attorney and counselor at law, shall have the same force and effect as the certificate provided for in the preceding section, but shall not dispense with the conditions therein prescribed, of age, residence, and citizenship, or declaration of intention to become a citizen.

Section 5. No person shall practice as an attorney and counselor at law in any court in this territory who is not a citizen of the United States, or who holds a commission as judge of any court of record, or who is a sheriff, coroner, or deputy sheriff; nor shall the clerk of the Supreme Court, or the clerk of the district court, or probate court, or deputy of either, practice in the particular court of which he is clerk, or deputy clerk; but nothing herein contained shall prevent attorneys and counselors at law who reside without this territory practicing in this territory, and noth-

ing herein contained shall prevent any judge of any of the courts of this territory from finishing any business by him undertaken in the District, Circuit or Supreme Court of the United States, prior to his election or appointment as judge; and an alien who has declared his intention to become a citizen of the United States may practice as if he were a citizen.

Section 6. That section 1 of chapter 6, Statutes 1893, and all acts and parts of acts in conflict with this act be and the same are hereby repealed. (Repealing Wilson's Statutes, sec. 223.)

Section 7. This act to take effect and be in force from and after its passage and approval.

Act Approved March 16, 1903.

Section 1. That any person residing in the territory or coming into the territory for the purpose of making it his permanent residence, upon producing satisfactory evidence that he has been regularly admitted as an attorney and counselor at law in a court of record of another state or territory, may be admitted to practice law in this territory, under such rules, regulations, and conditions as the Supreme Court may make and publish, upon producing satisfactory evidence that he is a person of good moral character, and that he has never been disbarred. (Additional to Wilson's Statutes, sec. 223.)

Section 2. This act shall take effect and be in force from and after its passage and approval, and all acts and parts of acts in conflict with the provisions hereof are hereby repealed.

Section 33 of Schedule of State Constitution.

Section 33. All attorneys at law licensed to practice in any court of record in the territory of Oklahoma, or in any of the United States courts for the Indian Territory, or any court of record of any of the Five Civilized Tribes, shall be eligible to practice in any court of the state without examination.

ROLL OF ATTORNEYS

The following attorneys, having complied with the Rules for Admission, were duly enrolled in the office of the Supreme Court clerk between November 19, 1907, and February 1, 1909.

It will be observed that the post office is lacking in the address of a number of the attorneys. Doubtless there are some errors in the roll, too. Information supplying such omissions, correcting such errors, or notice of deaths, or removals from the state, will be gratefully received at the office of the clerk of the Supreme Court. Names of attorneys enrolled hereafter will be published in supplementary lists in subsequent volumes.

A.

Abbott, Chas. P.	Durant	Anderson, R. S.	Woodward
Abbott, Warren D.	Tulsa	Anderson, W. N.	Waurika
Abernathy, G. C.	Pottawatomie Co	Andrews, Geo. L.	McAlester
Aby, Hulette F.	Tulsa	Andrews, L. C.	Pauls Valley
Adams, H. M.	Guthrie	Antony, E. L.	Walters
Adams, John	Guthrie	Antrobus, James H.	Taloga
Adams, J. M.	Ryan	Appelget, A. M.	Woodward
Adkins, Charles H.	Oklahoma C'y	Apple, Samuel A.	Ardmore
Admire, Willard H.	Duncan	Arlington, R. C.	Tecumseh
Ahern, George A.	Frederick	Armstrong, Eli C.	McCurtain Co.
Alberty, B. W.	Westville	Armstrong, J. R.	Boswell
Alexander, Charles R.	Woodward	Armstrong, S.	Lawton
Alexander, Franklin P.	Frederick	Arnold, C. S.	Atoka
Alexander, M. M.	Okmulgee	Arnold, E. B.	Stillwell
Allen, F. B.	Marlow	Arnote, A. J.	Antlers
Allen, R. C.	Coweta	Arnote, J. S.	McAlester
Allison, W. M.	Snyder	Arrington, R. C.	Pottawatomie Co.
Ames, C. B.	Oklahoma City	Asher, J. H.	Pond Creek
Anderson, A. W.	Woodward	Asher, M. D.	Enid
Anderson, A. W.	Henryetta	Asp, Henry E.	Guthrie
Anderson, C. M.	Idabel	Austin, Jno. G.	Grove
Anderson, D. W.	Slatook	Austin, W. C.	Eldorado
Anderson, John F.	Guthrie		

B.

Babcock, Lucius	El Reno	Beeman, A. C.	Cherokee
Bagg, Charles	Muskogee	Beesley, W. C.	Poteau
Bailey, De Roos	Muskogee	Beets, A. M.	Foss
Bailey, Frank M.	Chickasha	Beldleman, George C.	Okmulgee
Bailey, Hiram P.	Weatherford	Belford, Jabez	Okmulgee
Bailey, M. G.	Muskogee	Bell, Fleetwood	Sayre
Bailey, Samuel F. Pottawatomie Co		Bellamy, George W.	El Reno
Bailey, W. A.	Muskogee	Bellamy, Jno. M.	Lawton
Baker, Ed.	Watonga	Belvin, Watson	Durant
Baker, Hamilton E.	Okmulgee	Beman, Thomas R.	El Reno
Baker, Henry G.	Muskogee	Bennett, Caswell	Ardmore
Baker, J. A.	Muskogee	Bennett, Chas. Thomas	Pawhuska
Baker, J. A.	Wewoka	Bennett, J. E.	Nowata
Baker, Tritos	Holdenville	Bennett, W. W.	Muskogee
Baldwin, A. M.	Tecumseh	Benson, C. J.	Shawnee
Ballinger, Webster	Ardmore	Bentley, Finis	Edmond
Bamford, Enoch M.	Guthrie	Bernstein, Saul K.	Okla. City
Banks, Winston	Wewoka	Bickel, W. M.	Alva
Bannister, C. A.	El Reno	Biddison, A. J.	Tulsa
Bardsley, S. J.	Fairview	Biddison, V. H.	Pawnee
Barrett, Charles F.	Shawnee	Bierer, A. G.	Guthrie
Barrett, G. M.	Garvin	Biggers, V. R.	Tecumseh
Bartlett, Jos. B.	Tulsa	Biglow, G. T.	Muskogee
Barefoot, B. B.	Chickasha	Billingslea, Ira E.	Lincoln Co
Barker, R. U.	Oklahoma City	Billups, R. A.	Cordell
Barnes, Geo. G.	Oklahoma City	Bingham, George E.	El Reno
Barnes, T. J.	Idabel	Bingham, W. H.	Tishomingo
Barton, C. O.	Alva	Bird, J. W.	Pond Creek
Bass, J. A.	Ardmore	Black, Charles C.	Lawton
Bassman, W. H.	Claremore	Black, George E.	Lawton
Battenfield, A. Lee	Pryor Creek	Black, Oliver C.	Oklahoma City
Baughman, Homer	Muskogee	Blackburn, E. S.	Tulsa
Baughman, Ulysses M.	Okla. City	Blair, Charles A.	Guthrie
Baxter, Wm. L.	El Reno	Blair, Hubbard	Checotah
Bearden, G. C.	Wagoner	Blair, Robert F.	Wagoner
Beatty, William	Shawnee	Blair, W. B.	Kingfisher
Beaty, Jno. H.	Oklahoma City	Blake, C. O.	El Reno
Beauchamp, James K.	Enid	Blake, Ernest E.	El Reno
Becker, J. P.	Medford	Blake, William	Cleveland
Becker, Morris	Oklahoma City	Blakemore, E. P.	Bolcy
Beckett, A. L.	Stigler	Blakeney, B. B.	Shawnee

Blanchard, J.	Beaver Co	Branson, Fred P.	Muskogee
Bland, William F.	Muskogee	Brasted, Fred	Oklahoma City
Blanding, U. R.	Lawton	Braucht, H. S.	Newkirk
Blanton, J. T.	Pauls Valley	Breckenridge, M. A.	Tulsa
Bleakmore, W. R.	Ardmore	Breeden, Emery H.	Medford
Bledsoe, J. F.	Ardmore	Brennan, John H.	Bartlesville
Bledsoe, S. T.	Guthrie	Brents, T. E.	Ada
Blezek, J. W.	Lawton	Brett, Rutherford	Cordell
Bliss, Charles W.	Muskogee	Brewer, C. W.	Okemah
Boardman, H. N.	Watonga	Brewer, P. D.	McAlester
Boggs, Frank W.	Shawnee	Brewster, A. C.	Pryor Creek
Bohannon, Earl	Muskogee	Bridges, David M.	Chickasha
Bohart, J. C.	Chickasha	Briggs, William A.	Woodward
Bolen, Hubert L.	Oklahoma City	Brigham, Wm. A.	Coweta
Bolen, James W.	Ada	Broadbent, H. W.	Sulphur
Boles, John J.	Guthrie	Brook, Eck E.	Muskogee
Bolger, P. C.	Poteau	Brooke, C. R.	Oklahoma City
Boling, R. E.	Lindsay	Brooks, J. W.	Pottawatomie Co
Bond, Edward H.	Duncan	Brown, A. Dwight	Lehigh
Bond, Reford	Chickasha	Brown, G. A.	Mangum
Bonds, Archibald	Claremore	Brown, G. W. P.	Muskogee
Boner, Walter Lee	Durant	Brown, Geo. T.	Tulsa
Bonested, Floyd J.	McAlester	Brown, H. H.	Ardmore
Boone, R. D.	Pawhuska	Brown, H. S.	Cordell
Boone, Robert J.	Muskogee	Brown, J. L.	Oklahoma City
Booth, E. D.	Taloga	Brown, R. H.	Duncan
Bostick, Charles R.	Perry	Brown, T. L.	Claremore
Botsford, Charles L.	Norman	Brown, T. S. E.	Ardmore
Bowdre, W. H.	Watonga	Brown, Tracey	Muskogee
Bowles, Alfred W.	Guthrie	Brown, Virgil H.	Newkirk
Bowles, W. M.	Perry	Brown, Warren H.	Sapulpa
Bowman, George L.	Kingfisher	Brown, W. H.	Stigler
Bowman, W. F.	Ardmore	Brownlee, Emory C.	Kingfisher
Boyd, E. Allan	McAlester	Brownlee, Harry C.	Guthrie
Boynton, F. L.	Kingfisher	Bruce, C. P.	Garvin
Bozarth, Charles G.	Atoka	Brunson, David D.	Coalgate
Bozarth, Mark L.	Okmulgee	Brunt, J. A.	Okemah
Bradley, Chris M.	Muskogee	Bryan, Milton	Shawnee
Bradley, E. M.	Hobart	Bryan, T. L. O.	Woodward
Bradley, John T.	Kingfisher	Buchanan, Bayard T.	Okmulgee
Bradley, John T. Jr.	Kingfisher	Buckley, W. D.	Poteau
Brady, J. W.	Muskogee	Buckner, C. R.	Guthrie
Brainerd, Ezra Jr.	Muskogee	Buckner, D. W.	Enid

Buckner, Geo. W.	Enid	Burt, Leroy J.	Sapulpa
Bullock, Arden L.	Roff	Burton, A. J.	Lawton
Bulow, Henry G.	Arapaho	Burwell, Benj. F.	Oklahoma City
Bunn, C. O.	Ardmore	Burwell, Newton	Enid
Burdick, C. L.	Stillwater	Butler, Sam H.	Ardmore
Burford, Frank B.	Washington Co	Butterworth, C. W.	Tulsa
Burford, John H.	Guthrie	Butts, Geo. C.	Muskogee
Burger, John S.	Blackwell	Byers, Alonzo A.	Oklahoma City
Burlingame, E. P.	Guthrie	Byers, Samuel A.	Oklahoma City
Burnett, S. C.	Cordell	Byington, Henry	Caddo
Burns, John L.	Perkins	Byrd, C. T.	Tulsa
Burns, R. E.	Cushing	Byrne, J. L.	Creek Co
Burns, William Robert	Duncan		

C.

Cabell, J. V.	Ardmore	Case, Chas. B.	Anadarko
Cade, Wm, S.	Shawnee	Cassidy, Ed. O.	Guthrie
Cadel, John S.	Ardmore	Cassidy, P. O.	Shawnee
Cahill, L. E.	Hobart	Cassity, Galen E.	Oklmulgee
Caldwell, Fred S.	Oklahoma City	Castle, Cornelius E.	Wagoner
Calhoun, Samuel A.	Oklahoma City	Caudill, W. C.	Bokchito
Calhoun, Wm. W.	Wagoner	Caudill, Wm. M.	Frederick
Calvert, J. L.	Guthrie	Cavender, S. C.	Porum
Cameron, E. D.	Guthrie	Cavitt, F. O.	Tulsa
Campbell, Harry	Tulsa	Chambers, E.	Oklahoma City
Campbell, Newlin	Bartlesville	Chambers, James H.	Atoka
Campbell, R. M.	Oklahoma City	Chambers, Joe	Claremore
Campbell, W. H. L.	Ada	Chambers, Thos. G.	Okla. City
Cardwell, James C.	Weatherford	Champion, J. B.	Ardmore
Carey, Patrick	Oklahoma City	Chapman, Wm. L.	Guthrie
Carlisle, H. S.	Oklahoma City	Chappell, F. E.	Guthrie
Carlton, A. J.	McLoud	Chappell, G. A.	Newkirk
Carmichael, J. D.	Chickasha	Chappelle, Jno. D.	Guthrie
Carney, John J.	El Reno	Charlton, J. R.	Bartlesville
Carpenter, J. L.	Mangum	Chase, W. A.	Nowata
Carr, H. M.	Pauls Valley	Chase, W. L.	Westville
Carr, T. G.	Garvin	Cheadle, John B.	Alva
Carr, Wm. O.	Muskogee	Cheatham, Wm. L.	Creek Co
Carroll, Gray	Tulsa	Cherryhomes, J. W.	Lawton
Carswell, C. H.	Anadarko	Childers, Joseph W.	Oklmulgee
Carter, Dorset	Purcell	Christison, Cicero C.	Okla. City
Carter, Geo. S.	Noble Co	Church, H. T.	Wilburton

Clap, T. P.	Mangum	Connell, J. V.	Durant
Clapham, Wm. E.	Alva	Connella, Rufus R.	Lawton
Clapp, John H.	Wagoner	Conner, Benj. C.	Tulsa
Clapp, John H.	Okmulgee	Conner, Chas. B.	Pottawotomie Co
Clark, Adolphus	Chickasha	Connor, Thos. W.	Hobart
Clark, C. O.	Lawton	Cook, Charles Ashton	Muskogee
Clark, Edwin O.	Stigler	Cook, Thos. U.	Thomas
Clark, E. M.	Pawnee	Cook, W. S.	Thomas
Clark, Geo. W.	Oklahoma City	Cooper, Oscar	Kiefer
Clark, J. W.	El Reno	Cooper, Paul F.	Pawnee
Clark, J. W.	Atoka	Cope, M. B.	El Reno
Clark, Josiah	Ardmore	Coppidge, A. V.	Grove
Clark, Leigh W.	Oklahoma City	Corley, W. A.	Muskogee
Clark, T. T.	Altus	Cornell, Geo. W.	Weatherford
Clark, W. B.	Ponca City	Costello, Frank	Hobart
Clarke, E. F.	Woodward	Cotner, James A.	Ardmore
Clay, Colonel L.	Hobart	Cottingham, J. R.	Guthrie
Clayton, Wm. H. H.	McAlester	Couch, R. H.	Tahlequah
Clevinger, J. W.	Enid	Coughlin, Walter L.	Frederick
Clift, J. R.	Escniti	Coursey, J. D.	Tahlequah
Clift, Thomas R.	Guthrie	Cowan, J. A.	Moore
Cline, W. S.	Newkirk	Cowgill, F. M.	Alva
Clough, Samuel	Thomas	Cowley, Lawrence L.	Perry
Cobb, T. S.	Wewoka	Cox, Chas. A.	Oklahoma City
Cochran, A. D.	Okmulgee	Cox, J. D.	Tahlequah
Cochran, A. G.	Muskogee	Cox, M. D. Lecompton.	Guthrie
Cochran, C. B.	Durant	Cox, S. B.	Okmulgee
Cocke, John	Antlers	Craig, E. R.	McAlester
Coffee, R. N.	Pauls Valley	Craig, Frank	McAlester
Coffman, J. L.	Holdenville	Crain, Kenneth	Wagoner
Coffman, John L.	Frederick	Cramer, Oliver E.	Muskogee
Coffield, W. H.	Alva	Craver, A. E.	Bartlesville
Cogdel, W. E.	Enid	Crawford, J. P.	Ada
Cole, Homer A.	Ponca City	Cress, Parker W.	Perry
Cole, Jas. R.	Atoka	Crewson, D. B.	Tulsa
Cole, Preslie B.	McAlester	Criley, Wm. H.	El Reno
Collett, A. J.	Tulsa	Crittenden, Wm. L.	Stigler
Collier, Wm. A.	Eufaula	Crockett, Albert P.	Okla. City
Comstock, Allen W.	Ponca City	Crockett, Robert	Durant
Conant, F. M.	Pawnee	Cromwell, W. O.	Enid
Conkling, Lucius M.	Enid	Crook, J. M.	Durant
Conley, H. T.	Pawnee	Crosby, Thos. F.	Muskogee
Connell, J. R.	Durant	Crosby, W. A.	Muskogee

Crossan, W. B.	Shawnee	Cunningham, D. K.	Kingfisher
Crow, W. C.	Guymon	Cunningham, Harper S.	Guthrie
Crowell, C. M.	Wapanucka	Cunningham, S. M.	Lawton
Croxton, A. M.	Ada	Curd, Edw. Jr.	Muskogee
Cruce, A. C.	Ardmore	Curran, James E.	Blackwell
Cruce, W. L.	Ardmore	Curran, John F.	Enid
Cruce, Lee	Ardmore	Currie, W. G.	Ada
Crump, Arch M.	Holdenville	Curry, Guy A.	Quinton
Crump, Geo. C.	Wewoka	Curtis, W. L.	Sallisaw
Crump, W. J.	Muskogee	Curtys, Hill Cecil	Guymon
Cullison, James B.	Enid	Cutlip, C. G.	Wewoka
Cullom, H. E.	Lehigh	Cutlip, T. G.	Shawnee
Culwell, J. W.	Beaver	Cutler, Clinton E. B.	Lehigh

D.

Daggett, A. E.	Avard	Day, J. P.	Poteau
Dale, Frank	Guthrie	Day, Ralph W.	Oklahoma City
Dalton, Elmo M.	Stigler	Dean, J. R.	Woodward
Dance, Geo. N.	Blackwell	Dean, J. W.	Ada
Daniel, Thos. W.	Idabel	Declus, Lyle	Muskogee
Daniels, Jno. E.	Muskogee	Deck, Geo. F.	Durant
Darnell, A. E.	Foss	Deck, M. D.	Bennington
Davenport, C. J.	Pauls Valley	Deckard, Lex. V.	Oklmulgee
Davenport, James S.	Vinita	Decker, S. T.	Chandler
Davenport, L. P.	Antlers	Decker, V. S.	Chandler
Davenport, R. E.	Chickasha	Deen, E. L.	Ardmore
Davidson, Alex. A.	Muskogee	DeGraffenreid, Robt. F.	Muskogee
Davidson, R. L.	Tulsa	DeGroot, John Lorraine	Muskogee
Davidson, T. H.	Stigler	Deichman, Peter	Tulsa
Davis, B. F.	Wewoka	DeMeules, Edgar A.	Muskogee
Davis, Clarence	Bristow	Denman, D. H.	Fairview
Davis, Geo. O.	Weatherford	Denman, Stanley H.	Lawton
Davis, H. S.	Lawton	Dennis, M. A.	Enid
Davis, Harry G.	Muskogee	Denton, James C.	Nowata
Davis, J. C.	Wewoka	Devereux, John	Guthrie
Davis, John J.	Chandler	Dial, W. H.	Frederick
Davis, Louis	Lawton	Dick, E. J.	Buffalo
Davis, P. S.	Vinita	Dick, R. M.	Newkirk
Davis, T. J.	Lawton	Dick, R. W.	Ardmore
Davis, Wm. P.	Ardmore	Dickerson, J. T.	Chickasha
Daws, S. B.	Muskogee	Dickey, David F.	Muskogee

Dickson, Albert S.	Beaver	Drake, Wm. F.	Wagoner
Dickson, Robt. E.	Beaver	Drane, J. A.	McAlester
Dickson, T. A.	Grant	Drennan, J. B.	Pond Creek
Dickworth, I. C.	Pryor Creek	DuBois, T. H.	Poteau
Diffendaffer, J. A.	Lawton	Dudley, Chas. E.	Antlers
Dillard, Hays	Waurika	Dudley, J. B.	Norman
Dillard, J. M.	Altus	Duff, J. A.	Cordell
Disney, Ernest	Muskogee	Duffy, W. M.	Checotah
Dixon, W. T.	Lawton	DuMars, John E.	Oklahoma City
Dodson, J. M.	Enid	Dumenil, A. F.	Bartlesville
Dolman, L. S.	Ardmore	Dunham, Chas. P.	Pond Creek
Don Carlos, C. C.	Sapulpa	Dunlap, H. M.	Caddo
Donohue, Wm. J.	El Reno	Dunn, Jesse J.	Alva
Doolin, John B.	Alva	Durant, Horace B.	Miami
Downing, H. B.	Atoka	Durant, W. A.	Durant
Downs, Stephen	Boswell	Durham, W. F.	Tecumseh
Doyle, Thos. H.	Perry	Dyer, Chas. F.	Watonga
Doyle, T. T.	Okfuskee Co		

E.

Eacock, Geo. J.	Oklahoma City	Elliott, R. P.	Tulsa
Eagleton, W. L.	Pawnee	Elliott, Thos. E.	Nowata
Earl, John C.	Garvin	Ellison, R. H.	Okmulgee
Earl, W. E.	Lawton	Elrod, Walter D.	Okmulgee
Earley, A. T.	Oklahoma City	Elting, C. H.	Durant
Eaton, Jos. S.	Okmulgee	Embry, John	Guthrie
Echois, R. E.	Elk City	Emery, A. L.	Watonga
Eddleman, A.	Marietta	Enderlein, Theo. H.	Okla. City
Eddleman, E.	Marietta	Engart, W. M.	Tecumseh
Edgington, L. D.	Hominy	Englesman, A. B.	Oklahoma City
Edmister, Stanley C.	Cleveland	Ennis, Chester H.	Ada
Edmonson, R. B.	Billings	Epperson, Benj. H.	Ada
Edwards, Gasper	Oklahoma City	Erixon, Gustave A.	Guthrie
Edwards, H. R.	Guthrie	Eslick, Merrett	Muskogee
Edwards, Jos. A.	Stratford	Etheridge, A. G.	Hugo
Edwards, T. A.	Cordell	Eubanks, Ira N.	McAlester
Edwards, W. C.	Ada	Evans, Geo. H.	Chickasha
Eggerman, Don G.	Shawnee	Evans, O. M.	
Eichling, F. B.	Porum	Evans, T. D.	Tulsa
Elder, Howard E.	Oklahoma City	Everest, J. H.	Oklahoma City
Elkin, Fred M.	Guthrie	Ezzard, John T.	Chelsea
Ellerbee, A. A.	Braden		

F.

Fain, J. A.	Lawton	Ford, Jos. W.	Waurika
Fairchild, A.	Fairview	Fore, Jos. H.	Wagoner
Fannin, Fred H.	Stigler	Foreman, Grant	Muskogee
Fant, Leon B.	Wagoner	Foster, B. B.	Bartlesville
Faris, J. M.		Foster, Emery A.	Chandler
Farmer, Andrew J.	Clinton	Foster, Ephraim H.	Hugo
Farmer, Winfield S.	Atoka	Foster, J. W.	Stigler
Farnsworth, Jay P.	Muskogee	Foster, L. A.	Woodward
Farrar, Thos. J.	Vinita	Foster, Wm. E.	Oklmulgee
Fawcett, S. S.	Hughes Co.	Fowler, H. J.	Poteau
Fears, Walter T.	McIntosh Co.	Fowler, Oscar R.	Durant
Fecheimer, Chas. M.	Chickasha	Franklin, B. C.	Ardmore
Fegan, O. R.	Guthrie	Franklin, Ben.	Purcell
Ferguson, A. H.	Durant	Franklin, J. H.	Lawton
Ferguson, Geo. W.	Watonga	Franklin, W. C.	Muskogee
Fernandes, D. H.	Guthrie	Franklin, Wirt.	Ardmore
Ficher, H. S.	Medford	Franklin, Wm. M.	Madill
Field, John Walker.	Norman	Frantz, Frank.	Enid
Fielding, H. W.	Sulphur	Frederick, John W.	Stigler
Fisher, A. W.	Pryor Creek	Freeling, S. P.	Shawnee
Fisher, H. S.	Grant Co.	Freeman, Chas. R.	Checotah
Fitzgerald, E. C.	Miami	Freeman, W. F.	Ardmore
Fitzpatrick, Kirby.	McAlester	Freeman, Wm. P.	McAlester
Flesher, N. B.	Okemah	Fulkerson, T. D.	Ottawa Co.
Flynn, Dennis T.	Oklahoma City	Fuller, Wm. H.	McAlester
Fogg, Harry L.	El Reno	Fulton, Elmer L.	Oklahoma City
Fogle, Geo. P.	Vinita	Fulton, Marshall.	Oklahoma City
Foose, Seymour.	Watonga	Furman, Henry M.	Ada
Fooshee, Geo. C.	Coalgate	Furry, James B.	Muskogee
Ford, Chas. P.	Guthrie		

G.

Gahan, Wm. J.	Oklahoma City	Garner, E. M.	Ponca City
Galbraith, C. A.	Ada	Garrett, A. R.	Mangum
Galloway, Jas. O.	Duncan	Garrett, B. F.	Guthrie
Galyen, R. H.	Apache	Garrett, Marion L.	Tishomingo
Gamble, Robert S.	Oklmulgee	Garrett, S. B.	Mangum
Gardner, Neil B.	Ft. Supply	Gaskill, J. F.	Muskogee
Gardner, P. W.	Holdenville	Gay, Kent B.	McAlester
Garis, Adam S.	Enid	Gensman, L. M.	Lawton

George H. F.	McAlester	Grant, James H.	Oklahoma City
German, W. P. Z.	Muskogee	Grant, Whit. M.	Oklahoma City
Gernert, Jas. H.	Atoka	Graves, Eugene L.	Pittsburg Co
Gibbens, E. E.	Perry	Graves, Geo. T.	Cleveland
Gibbs, W. D.	Ardmore	Gray, Lee M.	Henessey
Gibson, C. T.	Lehigh	Green, Charlotte I.	Okl. City
Gibson, N. A.	McAlester	Green, Ernest L.	Oklahoma City
Giddings, E. J.	Oklahoma City	Green, Fred M.	Guthrie
Gidney, Samuel E.	Muskogee	Green, Geo. M.	Guthrie
Gifford, J. S.	Enid	Green, Hazen	Eufaula
Gilbert, W. I.	Duncan	Green, John B.	Oklahoma City
Gilkerson, C. S.	Elk City	Green, Maurice D.	Muskogee
Gill, Joseph A.	Craig Co	Green, Thos. F.	Purcell
Gillette, F. E.	El Reno	Greene, W. N.	Enid
Givens, James M.	Muskogee	Greene, W. N.	Ft. Towson
Gladish, J. S.	Guthrie	Gregg, W. J.	Tulsa
Glasco, E. E.	Purcell	Gresham, James M.	Norman
Glasser, Harry O.	Enid	Gresham, Wm. W.	Wagoner
Glaze, Geo. P.	Oklahoma City	Griffin, W. W.	Frederick
Gleason, Jno. L.	Guymon	Griffiths, Edwin P.	Muskogee
Glenn, A. C.	Pond Creek	Griffitts, J. L.	Newkirk
Glenn, W. T.	Hugo	Grigsby, H. L.	Chickasha
Godbey, Robt. W.	Apache	Grigsby, J. E.	Ada
Glitsch, Carl S.	Oklahoma City	Grigsby, Jesse D.	Norman
Goodlove, H. C.	Ryan	Grimes, Chas. W.	Tulsa
Goodrich, Fred S.	Oklahoma City	Grimm, S.	Grand
Goodwin, G. W.	Cleveland	Grinstead, E. E.	Pawhuska
Goodwin, J. E.	Oklahoma City	Gross, Benj.	Hugo
Gorden, Geo. W.	Wilburton	Gross, M. W.	Hugo
Gordon, I. J.	Wanette	Grove, J. P.	Alva
Gordon, James H.	McAlester	Gubser, Nichols	Tulsa
Gore, David B.	Tulsa	Guest, J. L. Q.	Duncan
Gormley, Clarence W.	Tulsa	Guffy, E. D.	Oklahoma City
Gourley, Austin R.	Okl. City	Gullett, Alexander	Tishomingo
Graham, Geo. G.	Norman	Gurley, Herman S.	Blackwell
Graham, J. C.	Marletta	Gust, Carl W.	Eufaula
Graham, John M.	Kingfisher	Gustin, F. M.	Cherokee

H.

Halley, D. M.....	McAlester	Hatch, A. A.....	Weleetka
Hainer, Bayard T.....	Perry	Hatchett, Claude C.....	Durant
Hale, Jas. W.....	Poteau	Hatchett, Jesse M.....	Durant
Hall, J. K.....	Altus	Haver, John A.....	Tulsa
Hall, Jno. T.....	Okmulgee	Hawley, Geo. A.....	Bennington
Halstead, S. R.....	Cherokee	Hayes, J. M.....	Guthrie
Hamill, James N.....	Lawton	Hayes, V. B.....	Durant
Hamilton, E.	Chickasha	Haynes, F. L.....	Tulsa
Hamilton, Wm. B.....	Mangum	Hays, John T.....	Hobart
Hammond, B. Pope.....	McAlester	Hays, R. G.....	
Hammonds, A. E.....	Lawton	Hayson, John W.....	Oklahoma City
Hammonds, H. C.....	Lawton	Hazelwood, Tom.....	Weleetka
Hampton, L. H.....	Watonga	Head, Hugh L.....	Muskogee
Hankins, M. L.....	Altus	Healy, Geo. H.....	Beaver
Hanna, H. W.....	Lawton	Heckaman, S. D.....	Shawnee
Hanod, Jno. Q. A.....	Durant	Hegler, Benj. F.....	Guthrie
Hanson, A. T.....	Nowata	Helsell, Charles A.....	Enid
Hardin, Lewis A.....	Holdenville	Henderson, Marion.....	Pauls Valley
Hardison, T. S.....	Hugo	Henderson, William C.....	Lawton
Hardy, Cornelius	Tishomingo	Hendricks, Jno. H.....	Hugo
Hardy, Summers	Madill	Hendrix, J. C.....	Sayre
Harley, J. G.....	McAlester	Henry, H. D.....	Mangum
Harnage, Jesse L.....	Tulsa	Hensley, Travis S.....	El Reno
Harper, J. H.....	Ryan	Henshaw, G. A.....	Guthrie
Harper, William P.....	Oklahoma City	Hepburn, James.....	Guthrie
Harris, J. G.....	Hobart	Herod, C. W.....	Woodward
Harris, J. H.....	Guymon	Herod, W. B.....	Guthrie
Harris, Samuel H.....	Oklahoma City	Herr, A. L.....	Chickasha
Harris, Vernon V.....	Wewoka	Herschelman, D. R.....	Porum
Harris, Wm. P.....	Muskogee	Heskett, F. H.....	Anadarko
Harrison, J. B.....	Sayre	Hiatt, William A.....	Muskogee
Harrison, L. D.....	Collinsville	Hickam, J. P.....	Perkins
Harrison, R. P.....	Muskogee	Hickok, W. P.....	Dewey Co
Harrison, Williams.....	Oklahoma City	Highley, Mont F.....	Oklahoma City
Harrison, W. H.....	Poteau	Hildreth, J. J.....	Guthrie
Harvey, E. E.....	Tulsa	Hildt, J. E.....	Wagoner
Haskell, C. N.....	Guthrie	Hill, Edward P.....	McAlester
Haskell, Norman R.....	Muskogee	Hill, H. L.....	Hugo
Hastain, Ed.....	Muskogee	Hill, Jesse H.....	Muskogee
Hastings, Edward.....	Pauls Valley	Hilton, S. H.....	Luther
Hastings, Wm. W.....	Tahlequah	Himes, E. Wade.....	Guymon

Hinch, M. W.....	Kingfisher	Howser, M. P.....	Tulsa
Hindman, C. J.....	Tulsa	Howsley, R. L.....	Guymon
Hinkle, John.....	Ardmore	Hubbell, O. D.....	Enid
Hinsley, T. M.....	Durant	Huddleston, C. T.....	Okeemah
Hirsch, Ed.....	Muskogee	Hudson, Chas. H.....	Wilburton
Hoag, Charles W.....	Oklahoma City	Hudson, G. D.....	Cushing
Hobbs, Virgil M.....	Guthrie	Hudson, J. F.....	McCurtain
Hobdy, E. J.....	Bluejacket	Hudson, R. H.....	Perry
Hocker, J. W.....	Purcell	Huett, Daniel.....	Enid
Hodges, Samuel H.....	Frederick	Huffar, D. W.....	Ada
Hoffman, Roy.....	Chandler	Hughes, Adelbert.....	Guthrie
Holbrook, C. W.....	Okmulgee	Hughes, Ernest B.....	Sapulpa
Holcomb, M. A.....	Okmulgee	Hughes, Judson J.....	Coweta
Holcombe, Marion L.....	Clinton	Hughes, P. C.....	Elk City
Holdeman, Orlando.....	Wagoner	Hughes, W. C.....	Oklahoma City
Holley, G. A.....	Stigler	Hughes, W. G.....	Texas Co.
Holt, Clarence P.....	Tecumseh	Hume, C. Ross.....	Anadarko
Holt, Thomas P.....	Ada	Humphrey, J. E.....	Ardmore
Homer, J. L.....	Muskogee	Humphrey, J. M.....	Atoka
Homer, Sol J.....	Caddo	Humphrey, Thomas C.....	Hugo
Honnold, A. B.....	Oklahoma City	Humphrey, Walter.....	Nowata
Hood, E. E.....	Shawnee	Hunt, F. C.....	Guthrie
Hoodenpyl, Geo. L.....	Boswell	Hunt, H. W.....	Waurika
Hopkins, Philip B.....	Muskogee	Hunt, W. T.....	Wagoner
Horbisson, I. E.....	Eldorado	Hunter, Chas. E.....	Guthrie
Hornor, C. G.....	Guthrie	Hunter, J. R.....	Hobart
Horton, Guy P.....	Altus	Hunter, John S.....	Oklahoma City
Horton, F. A.....	Oklahoma City	Hurley, P. J.....	Tulsa
Horton, L. D.....	Durant	Huser, W. A.....	Hastings
Hotchkiss, E. L.....	Watonga	Hussey, William Henry.....	Lawton
Houck, Adrian T.....	Tulsa	Huston, A. H.....	Guthrie
Houssels, R. S.....	Frederick	Hutchin, A.....	Lexington
Houston, R. K.....	Grady Co.	Hutchings, Wm. T.....	Muskogee
Howard, J. L.....	Foss	Hyams, W. W.....	Tulsa
Howard, R. A.....	Aramore	Hyde, John Q.....	McAlester
Howe, C. H.....	Hugo	Hyndman, John A.....	Hobart
Howell, Edward.....	Shawnee		

I.

Ingersoll, C. S. Pond Creek

J.

Jackson, Clifford L.....	Muskogee	Johnson, George F.....	Blanchard
Jackson, L. B.....	Sapulpa	Johnson, H. A.....	Perry
Jackson, Robert E.....	Sallisaw	Johnson, H. E.....	Altus
Jackson, W. C.....	Muskogee	Johnson, J. M.....	Durant
Jackson, William J.....	Norman	Johnson, J. W.....	Oklahoma City
Jacobs, F. W.....	Muskogee	Johnson, John T.....	Lawton
Jacobs, Hardin R.....	Purcell	Johnson, L. H.....	Mulhall
Jacobs, J. C.....	Enid	Johnson, T. A.....	Hugo
Jamies, George.....	Okmulgee	Johnson, Victor O.....	Pawnee
Japp, Amlil H.....	Lawton	Johnson, W. B.....	Ardmore
Jarrett, H. M.....	Stroud	Johnson, William L.....	Chandler
Jefferson, M. H.....	Guthrie	Johnston, Henry S.....	Perry
Jenkins, J. S.....	Oklahoma City	Jones, Cham.....	Ryan
Jenkins, W. M.....	Oklahoma City	Jones, Edward R.....	Muskogee
Jennings, Al J.....	Lawton	Jones, J. J.....	Sapulpa
Jennings, Harry.....	Claremore	Jones, J. W.....	Atoka
Jennings, J. D. F.....	Oklahoma City	Jones, Olin W.....	Garvin
Johns, George A.....	Okeemah	Jones, Oliver P.....	Tulsa
Johns, W. L.....	Talequah	Jones, Philos S.....	Wilburton
Johnson, A. W.....	Geary	Jones, Robert T.....	Pauls Valley
Johnson, Albert P.....	Kiowa County	Jones T. W. Jr.....	Weatherford
Johnson, B. S.....	Durant	Jones, Thomas S.....	Guthrie
Johnson, Charles E.....	Oklahoma C.	Jones, W. P.....	Hugo
Johnson, David I.....	Oklahoma City	Jorgenson, P. L.....	Anadarko
Johnson, Garfield.....	Muskogee	Joyce, Andrew.....	Sapulpa

K.

Kane, M. J.	Guthrie	Kerr, I. H.	Anadarko
Kates, Philip	Tulsa	Key, George D.	Lawton
Kean, Louis A.	Muskogee	Keys, L. M.	Hobart
Keaton, J. R.	Oklahoma City	King, A. J.	Lawton
Keenan, Bruce L.....	Tahlequah	King, B. C.	Aja
Kelger, Charles M.	Norman	King, Frederick	Tecumseh
Kelley, Alfred	Muskogee	King, Clifford W.	Hollis
Kellogg, F. H.	McAlester	King, I. M.....	Ada
Kelsey, Dana H.	Muskogee	King, Jno. H.	Muskogee
Kendall, D. J.	Sulphur	King, J. F.	Newkirk
Kendricks, Charles B.	Davis	Kinkade, F. V.	Ardmore
Kennemer, F. E.	Madill	Kleinschmidt, R. A.	Okla. City
Kerr, Edwin S.	Roff	Kline, Walter	McAlester

Knapp, W. P.	Oklahoma City	Krug, Alfred M.	Tulsa
Knappe, Emil C.	Lawton	Kruse, Carl	Enid
Knowles, Lafe	Hobart	Kryder, R. L.	Okmulgee
Knott, W. J.	Cordell	Kuykendall, E. H.	Muskogee
Kornegay, W. H.	Vinita	Kyle, S. H.	Durant

L.

LaHay, Joe M.	Claremore	Levy, Harry D.	Muskogee
Laing, George H.	Kingfisher	Lewis, Anson	Pauls Valley
Lamb, F. F.	Okmulgee	Lewis, Daniel W.	Kingfisher
Landrum, E. M.	Talequah	Lewis, Fielding	Guthrie
Lane, D. A.	Oklahoma City	Lewis, Isaac O.	Madill
Langley, J. H.	Pryor Creek	Lewis, James R.	Oklahoma City
Langston, W. P.	Holdenville	Lewis, W. N.	Davis
Lasher, Oliver C.	Chandler	Libby, N. D.	El Reno
Latta, Keith N.	Oklahoma City	Lightfoot, W. P.	Enid
Laughbaum, H. T.	Okla. City	Lillard, Ross N.	Guthrie
Laune, S. B.	Woodward	Lilley, J. ..	Muskogee
Lawrence, S. S.	Guthrie	Liming, Clement V.	Anadarko
Lawrence, Wm. L.	Tishomingo	Lincoln, Chas. P.	El Reno
Lawrence, Wm. R.	Muskogee	Lindblad, Walter E.	Eschite
Lawson, Engere B.	Nowata	Linebaugh, D. H.	Atoka
Lawson, J. H.	Mountain Park	Linebaugh, F. N.	McAlester
Lawson, Lewis C.	Hokleville	Linebaugh, J. H.	Atoka
Lawter, J. W.	Custer Co.	Linn, Will	Chickasha
League, James R.	Tulsa	Lipscomb, Thea E.	Muskogee
Leahy, T. J.	Pawhuska	Little, J. C.	Ardmore
Learnard, Oscar E. Jr.	Bartlesville	Livesay, Randall U.	Anadarko
Ledbetter, H. A.	Ardmore	Livingston, John	Sayre
Ledbetter, W. A.	Ardmore	Lockridge, Ross F.	Shawnee
Lee, Albert J.	Ardmore	Lockwood, Cass T.	Blackwell
Lee, Frank E.	Okeemah	Lockwood, J. P.	Sulphur
Lee, J. A.	Enid	Loden, H. H.	Durant
Lee, Robert E.	Ardmore	Logan, Oran J.	Mountain View
Leedy, Clarence B.	Grand	Long, James A.	Wetumka
Leeka, C. O.	Custer City	Longfellow, Geo. N.	Okla. City
Lenau, Chas. W.	Hobart	Loofbourrow, R. H.	Beaver
Leidtke, Wm. C.	McIntosh Co.	Lookabaugh, I. H.	Watonga
Leopold, G. W.	Muskogee	Loomis, P. H.	Wakita
Lester, Eugene Fay	Wilburton	Losey, Thos. B.	Atoka
Lester, Preston S.	McAlester	Low, H. B.	El Reno
Lester, Richard M.	Ardmore	Lowary, A. J.	Watonga

Lowe, Jos. G.	El Reno	Lunsford, T. B.	Talibina
Lowe, Russell G.	Oklahoma City	Lybrand, W. A.	Oklahoma City
Lowry, Chester H.	Stillwater	Lydecker, John E.	Tulsa
Lowry, Robert A.	Stillwater	Lydick, J. D.	Shawnee
Lucas, J. B.	Checotah	Lyle, R. A.	Kingfisher
Lucas, W. M.	Tishomingo	Lyons, Thos. D.	Tulsa
Lukenbill, Wilber C.	Frederick	Lytle, L. O.	Guthrie

M.

McAdams, E. G.	Oklahoma City	McKeel, J. F.	Ada
McArthur, C. L.	Lindsay	McKeller, H. G.	Enid
McBrian, C. A.	Jefferson Co	McKelvy, J. G.	Pond Creek
McCaleb, J. A.	Oklahoma City	McKennon, Archibald S.	McAlester
McCalla, J. R.	Marietta	McKennon, T. H.	Guthrie
McCann, Wm. L.	Oklahoma City	McKenzie, M. L.	Shawnee
McClusky, W. S.	Tulsa	McKenzie, M. W.	Shawnee
McCombs, Jason G.	Sallisaw	McKeown, Thomas D.	Ada
McComb, T. J.	Oklahoma City	McKinley, R. W.	Guthrie
McConnell, W. T.	Oklahoma City	McKinney, B. A.	Durant
McCoole, Jno. I.	Francis	McLees, C. E.	Muskogee
McConnell, Wm. T.	Oklahoma City	McLendon, R. L.	Seminole
McCrory, Claud	Alva	McLoud, J. W.	Muskogee
McCulloch, Geo. E.	Vinita	McMahan, Argyle J.	Okla. City
McDaniel, David A.	Frederick	McMaster, Frank	Lawton
McDonald, A. A.	Hugo	McMechan, Tom F.	Oklahoma City
McDonald, Alex.	Pawhuska	McMillan, R.	Pauls Valley
McDonald, C. S.	Pawhuska	McMillan R. N.	Oklahoma City
McDonnell, Thomas P.	Newkirk	McMurray, J. F.	McAlester
McDougal, D. A.	Sapulpa	McNeal, W. H.	Ardmore
McDowell, John G.	Bartlesville	McNeil, N. E.	Pawnee
McElhinney, Ray	Okmulgee	McPharren, C. E.	Caddo
McElhoes, S. I.	Lawton	McRea, A. S.	Muskogee
McFall, Wright L.	Tecumseh	McRill, A. L.	Blaine Co
McGill, Hugh W.	Ardmore	McVay, Perry T.	Guthrie
McGraw, Henry		McVean, Margaret	Okla. City
McGuire, Frank H.	Guthrie	McVey, Grattan G.	Lehigh
McGuire, H. P.	Frederick	McVickers, C. W.	Woodward
McInnis, E. E.	Coalgate	Maben, W. N.	Shawnee
McIntosh, Cheesie	Checotah	MacDonald, D. S.	Bokchito
McIntosh, Edward W.	Gotebo	Mackey, A. M.	Medford
McIntosh, J. T.	Durant	Mackey, Paul F.	Vinita
McKamy, J. L.	Sparks	Madalene, Jean	Pond Creek

Madaris, Wm. A.	Hobart	Meister, Melvin G.	Okla. City
Madden, D. B.	Shawnee	Mellette, W. M.	Muskogee
Madison, Frank W.	Fairview	Melton, Adrian	Chickasha
Magee, Carl C.	Tulsa	Melton, Alger	Chickasha
Magee, Percival	Tulsa	Melton, H. L.	Prague
Malcomb, C. E.	Blaine Co	Merriman, S. A.	Bokoshe
Malloy, P. H.	Tulsa	Merriweather, A. L. J.	Muskogee
Mann, Geo. L.	Creek Co	Meyer, A. H.	Ardmore
Mann, Phillip E.	Sapulpa	Meyer, J. H.	Oklahoma City
Manning, Edwin H.	Okla. City	Miller, Chas. W.	Weleetka
Mansell, J. W.	Hobart	Miller, Freeman	Stillwater
Marchant, E. B.	Clinton	Miller, Geo. Jr.	Oklahoma City
Maris, L. A.	Ponca City	Miller, Henry J.	Chickasha
Marr, Chester A.	Guthrie	Miller, J. W.	Dustin
Marr, L. D.	Tulsa	Miller, Loyal J.	Oklahoma City
Mars, Frank L.	Sapulpa	Mills, Lawrence	Arapahoe
Mars, Jas.	Sapulpa	Mills, Walter S.	Arapahoe
Marshall, C. H.	Silo	Mills, Stephen A.	Atoka
Marshall, Hanson L.	Eufaula	Minter, J. O.	Madill
Marshall, J. W.	Duncan	Mintonye, B. A.	Guthrie
Martin, Benjamin J.	Muskogee	Mitchell, Chas. T.	Stigler
Martin, Geo. W.	Gotebo	Mitchell, E. L.	Cheyenne
Martin, H. B.	Perry	Mitchell, J. D.	Pauls Valley
Martin, Lewis T.	Bennington	Mitchell, J. J.	Oklahoma Co
Martin, L. J.	Tulsa	Mitchell, Jos. D.	Pawhuska
Martin, Luther	Cherokee	Mitchell, L. D.	Oklahoma City
Martindale, D. M.	Tulsa	Mitchell, Noble	Sulphur
Martindale, Merritt	Sayre	Mitchell, P. D.	Stillwater
Marum, David P.	Woodward	Mitchell, W. B. M.	Pauls Valley
Mason, I. R.	Ardmore	Mitchell, W. O.	Oklahoma City
Massingale, S. C.	Cordell	Mitchell, Wm. C.	Oklahoma City
Mathers, Jas. H.	Ardmore	Mitschrich, Chas.	Lawton
Mathews, Frank	Mangum	Mock, M. L.	Guthrie
Mathews, W. M.	Okmulgee	Momyer, W. W.	Muskogee
Matlack, Geo. A.	Okla. City	Monk, Carl	Muskogee
Matson, D. C.	Ardmore	Montgomery, F. L.	Muskogee
Maupin, J. A.	Perry	Montgomery, Geo. H.	Marietta
Maupin, R. W.	Perry	Montgomery, Wm. H.	Okla. City
Maurer, W. A.	El Reno	Moody, W. E.	Claremore
Maxey, J. H.	Shawnee	Moon, Chas. A.	Muskogee
Maxey, N. B.	Muskogee	Moore, C. L.	Enid
Meachem, A.	Erick	Moore, Chas. G.	Purcell
Mechling, Geo. J.	Kay Co	Moore, D. G.	Texmo

Moore, Edwin Gray	Muskogee	Morris, Perry J.	Shattuck
Moore, E. H.	Okmulgee	Morrison, D. C.	Muskogee
Moore, Gray	Muskogee	Morrison, Duncan L.	Guthrie
Moore, J. B.	Ardmore	Morse, Joseph D.	Hobart
Moore, Jno. C.	Enid	Morton, O. A.	Okfuskee
Moore, Jno. B.	Muskogee	Morton, W. B.	Kiefer
Moore, Jno. J.	Muskogee	Mosher, H. T.	Tulsa
Moore, J. Read	McAlester	Mosher, L. L.	Wagoner
Moore, P. G.	Checotah	Mosler, John H.	Norman
Moore, Wm. L.	Hennessey	Mosler, L. P.	Frederick
Moore, U. C.	Lawton	Moss, A. F.	Oklahoma City
Morgan, Barclay	Okmulgee	Moss, W. B.	Wagoner
Morgan, D. H.	Muskogee	Mossman, Benjamin	Muskogee
Morgan, Dick T.	Woodward	Mouser, W. H.	Cheyenne
Morgan, H. W.	Anadarko	Muldrow, H. L.	Tishomingo
Morgan, Porter H.	Oklahoma City	Murchison, Kenneth S.	Tahlequah
Morrill, P. K.	Altus	Murphey, Geo. A.	Muskogee
Morris, A. J.	Anadarko	Murphey, James J.	Kiefer
Morris, C. A.	Hobart	Murray, T. D.	Pauls Valley
Morris, E. E.	Duncan	Murray, Wm. H.	Tishomingo
Morris, J. A.	Lawton	Museller, A. R.	Alva
Morris, J. W.	Tishomingo	Myers, Chas. M.	Lawton
Morris, Lon	Randlett		

N.

Nagle, P. S.	Kingfisher	Nicholson, Geo. M.	Sulphur
Nance, Richard Y.	Stillwell	Niles, Claude A.	Checotah
Nash, T. D.	Alva	Noah, Henry A.	Alva
Neely, Geo. A.	Chandler	Noffsinger, W. W.	Muskogee
Neely, Sam	Bokoshe	Norman, J. F.	Oklahoma City
Nelson, E. G.	Idabel	Norman, John L.	Okemah
Nelson, Flowers	Tulsa	Norman, Thos.	Ardmore
Nelson, Thomas O.	Hugo	Norvell, Woodson	Tulsa
Newell, Wm. M.	Norman	Nowlin, Claude	Oklahoma City
Newman, H. O.	Tishomingo	Nuckolls, Robert L.	Okemah
Nichols, E. F.	Caddo	Nussbaum, Bert E.	Muskogee
Nicodemus, A.	Tulsa		

O.

O'Bannon, S. L.	Okemah	O'Relly, Ellis J.	Eufaula
O'Bryan, J. B.	Purcell	Osborn, Monroe	Pauls Valley
O'Bryan, T. L.	Woodward	Outcalt, Geo. A.	Shawnee
O'Hare, S. V.	Muskogee	Overstreet, Jno. W.	Bristow
Oldfield, Edward D.	Okla. City	Owen, Thos. H.	Muskogee
Olds, Harvey C.	Guthrie	Owen, Walter L.	Cherokee
O'Meara, J. P.	Bartlesville	Owens, M. D.	Chandler

P.

Palmer, Jno. E.	Bartlesville	Pettis, John A.	Oklahoma City
Palmer, John F.	Pawhuska	Pettit, Arthur	Coyle
Pancoast, Jno. L.	Kay Co	Pfendler, Fred	Muskogee
Parker, C. H.	Enid	Phelps, Edwin J.	Muskogee
Parker, Chas. C.	Durant	Phelps, W. A.	Hobart
Parker, Howard	Ada	Phillips, Chas. A.	Durant
Parks, Howell	Muskogee	Phillips, Chas. L.	Oklmulgee
Parks, J. D.	Idabel	Phillips, J. B.	Lawton
Parks, S. F.	Vinita	Phillips, James I.	El Reno
Parmenter, B. M.	Lawton	Phillips, Rufus P.	Arapahoe
Parshley, Stephen A.	Lawton	Phillips, Victor C.	Durant
Parsons, Harry T.	Alva	Pinkham, C. L.	Newkirk
Patchett, Owen W.	Pauls Valley	Pitchford, John H.	Tahlequah
Patridge, Geo. W.	Cherokee	Pitman, Clyde G.	Tecumseh
Patterson, J. B.	Weleetka	Pitman, L. G.	Shawnee
Patton, E. C.	Tishomingo	Pleffer, Wm.	Ardmore
Patton, J. A.	Woodward	Plumlee, J. W. H.	Ryan
Paul, G. A.	Oklahoma City	Poe, Lewis M.	Tulsa
Paullin, Lewis	Durant	Pollan, John R.	Poteau
Payne, E. M.	Grady Co	Pomeroy, W. H.	Perry
Payne, Victor	Watonga	Poole, W. L.	Durant
Pearl, Geo. S.	El Reno	Pope, D. K.	Oklahoma City
Peck Cassius R.	Muskogee	Pope, Paul M.	Oklahoma City
Peck, Chas. D.	Clinton	Porter, Geo. M.	McAlester
Peck, H. M.	Oklahoma City	Potter, Jno. G.	Oklfuskee
Peery, Cliff V.	Wilburton	Potter, R. T.	Oklmulgee
Pendleton, W. S.	Shawnee	Potter, W. D.	Ardmore
Penick, Giles A.	Muskogee	Potterf, H. C.	Ardmore
Perkins, G. N.	Guthrie	Pounders, L. K.	Wilburton
Perkins, J. B.	Shawnee	Powell, G. K.	Muskogee
Perkins, Mica John T.	Lawton	Powell, Jas. L.	Muskogee

Powell, W. W.	Antlers	Pryor, W. W.	Konawa
Powers, J. A.	Mangum	Pursel, Carl	Muskogee
Pratt Clifton J.	Oklahoma City	Putnam, I. M.	Oklahoma City
Proctor Jno. F.	Hugo	Putty, Geo. T.	Marlow
Proctor, W. A.	Marlow	Pyeatt, Alvin F.	Pauls Valley
Prulett, Moman	Oklahoma City		

R.

Rabittaille, Ernest A.	Tulsa	Reynolds, A. W.	Comanche
Ragland, Burwell A.	Ardmore	Rhea, Evert P.	Porter
Raines, William H.	Guymon	Rice, Benj. F.	Tulsa
Rainey, R. M.	Atoka	Rice, C. T.	Purcell
Rainey, W. H.	Atoka	Rice, F. E.	Lindsay
Rains, Fred	Muskogee	Rice, R. F.	Ada
Ralls, J. G.	Atoka	Richard, Jay E.	Guthrie
Ralls, Geo. T.	Coalgate	Richardson, Chas. E.	
Ramsey, Geo. S.	Muskogee	Richardson, D. A.	Durant
Ramsey, John R.	Tulsa	Richardson, Dio.	Lawton
Randolph, B. H.	Oklahoma City	Richardson, Geo. W.	Hugo
Randolph, C. T.	Coalgate	Richmond, Alexander	Muskogee
Randolph, D. S.	Okeene	Riddle, F. E.	Chickasha
Randolph, H. W.	Tulsa	Riddle, John W.	Tulsa
Ransdale, B. F.	Tulsa	Riddle, Seymour	Vinita
Rappolee, J. L.	Caddo	Rider, Geo. E.	Madill
Ratliff, E. S.	Ada	Rider, O. L.	Vinita
Ratliff, J. S.	Tishomingo	Ridings, Sam P.	Pond Creek
Ray, J. Robert	Bartlesville	Righter, F. B.	Broken Arrow
Ray, R. J.	Lawton	Riley, Shillon	Duncan
Ready, J. H.	Oklahoma City	Ritchey, W. H.	Durant
Reasor, Edgar D.	Shawnee	Rittenhouse, Austin J.	Chandler
Red, J. Earle.	Holdenville	Rittenhouse, F. A.	Chandler
Redwine, W. H.	McAlester	Rittenhouse, Geo. B.	Chandler
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Rennie, Albert.	Pauls Valley	Roberts, Ira M.	Sulphur
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Smith, Herbert.....	Oklmulgee	Stanley, Grant.....	Luther
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Whitaker, Walter.....	Guymon	Wilson, D. H.....	Vinita
White, Chas. W.....	Woodward	Wilson, E. G.....	Catoosa
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Whitney, E. W.....	Wewoka	Winsor, Harry.....	Stillwater
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Wiggins, S. T.....	Wagoner	Wolf, Benj. F.....	Norman
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21. **Failure to Present Objections in Trial Court.** This court will not reverse, vacate, or modify a judgment which is supported by competent evidence, nor consider in connection with error, based upon such grounds, questions of erroneous procedure which were not presented to the consideration of the trial court in the motion for new trial **Bank v. Bensing**..... 257
22. **Sufficiency of Evidence.** Where the evidence reasonably supports the verdict, the finding of fact will not be disturbed by this court. **Howell v. Blesh** 260
23. **Same—Harmless Error.** Errors committed by a trial court which do not affect the substantial rights of the party against whom it was committed will be ignored on appeal. *Id.*..... 260
24. **Exceptions—General Exceptions Insufficient, When.** A general exception to a refusal to submit to the jury a number of special interrogatories is insufficient if any one of them be improper. **Railway Co. v. Witt**..... 262
25. **Same—Excessive Verdict—Grounds for Setting Aside.** The verdict of a jury should not be set aside on the ground that it is excessive, unless it clearly appears that the jury have committed some gross and palpable error or have acted under some improper bias, influence, or prejudice, or have mistaken the rules of law stating the measure of damages. *Id.*..... 262
26. **Review—Evidence—Record.** Where the question for review depends in any wise upon the evidence, such evidence must be

APPEAL AND ERROR—Continued.

- presented in full to the appellate court, or the question will not be considered. *Anderson v. Territory*..... 274
27. **Same—Motion for New Trial—Insufficient Record.** Where a motion for a new trial presents material questions of fact necessary for determination, error can not be predicated upon the overruling of said motion, where the record fails to show that it contains all the evidence introduced upon the hearing. *Id.*..... 274
28. **Evidence—Exclusion—Harmless Error.** Error committed by a trial court in excluding a written instrument from evidence will not justify a reversal of the judgment where secondary evidence is received in lieu thereof and it is apparent that the party offering such instrument was not prejudiced by its exclusion; the facts sought to be established thereby and proven by parol evidence not being disputed. *Moore v. Linn*..... 279
29. **Insufficient Evidence—Reversal and Dismissal—Case.** Where a plaintiff fails to offer any evidence in support of an allegation of a petition which, if proven, would authorize a recovery, and the case is appealed to this court, such allegation, for the purposes of the appeal, will be deemed to have been waived; and while, in case of a reversal and remanding for a new trial, evidence might, on such second trial, be offered in support thereof, this court will not order a new trial for the purpose of affording such opportunity, as it is the duty of a litigant to offer all of his evidence at the first trial at which the law permits him to do so. *Railroad Co. v. McGivney*..... 361
30. **Orders—Appealable Orders—Ancillary Proceedings.** An order directing the judgment debtor to apply certain property to the satisfaction of the judgment, made in proceedings in aid of execution, is an order affecting a substantial right, made in a special proceedings in a case after judgment, and is appealable. *Ryland v. Milling Co.*..... 435
31. **Sufficiency of Evidence.** Where there is evidence in the case which reasonably tends to support the special findings of the jury, and the general verdict, the decision will not be reversed on a question of fact. *Railway Co. v. Martin*..... 511
32. **Same—Inconsistency of Findings.** Where there is a reasonable theory, deducible from the evidence in the case, upon which the special findings of the jury and their general verdict are sustained, the court will not disturb the general verdict because another theory may be drawn from the evidence with which the special findings and the general verdict are inconsistent. The court will not examine the evidence with a view to ascertaining if it is possible to evolve from the evidence a theory upon which an inconsistency may be discovered between the special findings and the general verdict. *Id.*..... 514

APPEAL AND ERROR—Continued.

33. **Evidence—Review—Question of Fact.** Where the evidence, as contained in the record, reasonably tends to support the findings of the jury, this court will not disturb such findings on a question of fact. *Railway Co. v. Mitchell*..... 579
34. **Summary Dismissal—Scurrilous Brief.** Where the plaintiff in error files what is designated as a brief in support of his assignment of error, and in such written argument makes an abusive, wanton, insulting, and scurrilous assault upon the judgment appealed from, and which is an inexcusable and unwarranted reflection upon the trial judge, the so-called brief will be stricken from the files, the case treated as if no brief had been filed, and the appeal dismissed for failure to comply with the rules of the court. *Lumber Co. v. Newell*..... 590

APPEARANCE:

General Appearance—Special—Jurisdiction. Where a motion is made in which questions are raised which go to the jurisdiction of the court over the parties, and in which questions are also raised which cannot be raised by special appearance but can only be heard upon a general appearance, the parties will be taken and held to have entered a general appearance, and in such case defects in the service of summons will be deemed and held to have been waived, even though such appearance be made after judgment and upon a motion to vacate and set aside such judgment. *Rogers v. Mercantile Co.* 115

ASSESSMENT—See "Eminent Domain," "Taxation."

ASSIGNMENT—See "Attachment," 1; "Mortgages," 2.

ATTACHMENT:

1. **Claims by Third Persons—Void Assignment Disregarded — Burden of Proof.** Where an assignment for the benefit of creditors is void, but the assignee has taken possession of the property, and the sheriff levies upon such property under an order of attachment in an action against the assignor, and finally sells the property under an order of sale which recites the judgment of the court for the amount recovered in the case, and also an order sustaining the attachment and for the sale of the property, in an action by the assignee against the sheriff for conversion, the burden of proof is upon the assignee to establish his right to recover by a preponderance of the evidence. In such circumstances the order of sale, which was regular upon its face, will prevail over the void assignment; and, where the record shows that an assignment is void, proof of such assignment will not defeat an attachment proceeding against the assignor. The property will be treated as the property of the assignor and measured by the same rules that would obtain without said assignment, and even possession of the property by the assignee

ATTACHMENT—Continued.

- at the time of the attachment will not inure to his benefit.
Bingham v. Ozmun 225
2. **Bond to Pay Judgment—Action Thereon—Evidence—Necessary Averments.** In an action on an undertaking given by the defendant in an attachment case, under section 4107 of the Statutes of Oklahoma of 1893 to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking. **Commission Co. v. Bank**.... 302
3. **Property Subject to Attachment—Goods Conditionally Sold.** Where goods are sold and delivered upon condition that the title shall not pass to the vendee unless the price agreed upon be paid, the vendee has no attachable interest in the property until the performance of the condition. **McIver v. Williamson, etc., Co.** 454

ATTORNEY AND CLIENT:

1. **Authority of Attorneys—License to Practice—Judicial Notice** In this territory, attorneys at law receive their license, and are authorized by the supreme court to engage in the practice of the law, and to transact business as attorneys at law, and the courts of the territory will take judicial notice of the fact that one appearing and acting as an attorney is or is not duly authorized. **Nolan v. Railroad Co.**..... 51
2. **Same—Scope of Authority.** Any duly authorized attorney may, after the subject matter has been placed in his hands, give any notice affecting the substantial rights of his client which the client himself might have given, and those affected by such notice must take notice of it. **Id.**..... 51
3. **Same—Dispute of Authority—Burden of Proof—Presumptions.** Where notice material to the maintenance of a suit has been given by an attorney, those disputing the authority of the attorney and who rest their defense, in an action based thereon, upon the fact that they dispute the attorney's authority to give important notices, must maintain such defense in court, for a court of record in Oklahoma will presume that an attorney admitted to the practice is acting in all matters affecting his client's rights, with authority from the client he represents. **Id.**..... 51

B.

BILLS AND NOTES:

1. **Action—Defense—Misrepresentations of Conditions.** In the absence of any proof that the signer of a note or written instrument is unable to read, an answer which admits the execution of a subscription note sued upon, but alleges that the person procuring the note had misrepresented the conditions of the same and the extent of the liability that the defendant would incur

BILLS AND NOTES—Continued.

- in signing the same, where the note is in plain language and unambiguous in its terms, such answer will be insufficient to constitute a defense. *Railroad Co. v. Rhodes* 21
2. **Action—Pleading—Party in Interest—Public Policy—Railroad Bonus.** A petition praying for judgment upon a promissory note containing a provision showing that it was executed in consideration of the benefits arising to the maker by reason of the construction of a railroad from a given place to another place named, by a time stated, and which is made payable to a construction company, without naming the railroad to be built, or any railroad company as an interested party, does not present such a question of public policy as to make such petition demurrable upon that ground. *Sparks v. Construction Co.*..... 55
3. **Same—Answer—Burden of Proof.** Where, in an action upon a promissory note which sets forth as the consideration thereof the construction of a railroad to a given point by a given time, an answer is filed setting up a distinct contract providing for the conveyance of real estate as the consideration for the execution and delivery of said note, and where the reply to such answer denies under oath the execution and delivery of such contract, the burden of proving the execution and delivery thereof is upon the defendant, and a failure to prove the execution and delivery of such contract precludes its being received in evidence, and is a failure of that ground of defense. *Id.*..... 55
4. **Consideration, When Sufficient—Personal Benefit.** Where a benefit is conferred by a third party or a detriment suffered by the payee of a note at the instance of the maker thereof, it will be sufficient consideration to support the note, even though the maker thereof received no personal benefit by reason of the execution and delivery thereof. *Doxy v. Bank* 183
5. **Same—Estoppel—Case.** Where a joint and several promissory note is secured by a chattel mortgage, and a third party signs the note some time after the execution and delivery upon the consideration that the payee or holder will release or waive his mortgage security, which is done, when sued individually on the note, he is estopped from claiming that he signed the note without the knowledge of the original makers. *Id.* 183
6. **Bank Check—Time for Presentment.** The holder of a bank check is entitled to a reasonable time in which to present it for payment; and, where the holder of a check lives in the same place that the bank on which the check is drawn is located, he has during the banking hours of the next day after receiving it in which to present it for payment. *School District v. Eager* 235
7. **Same—Mistake in Signature—Case.** It is the duty of one, when signing a check, to see to it that he signs it properly; and where a treasurer of a school district, in paying a debt of the district,

BILLS AND NOTES—Continued.

delivers a check signed in his individual name, and the bank refuses to cash it, because the maker of the check had no funds on deposit in the bank, and several days afterwards the check was changed by the maker, by adding his official character, as treasurer of the school district, to his signature, and before the close of the banking hours of the second day after the check was corrected, the bank on which it was drawn failed (the next day after the correction of the check being Sunday), the loss will fall upon the maker of the check, which in this case was the district. *Id.*.....

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8. **Non-negotiable Notes—Bona Fide Purchaser—Subject to all Defenses.** A non-negotiable note, transferred to an innocent purchaser before maturity and for a valuable consideration, without notice, either actual or constructive, to the maker thereof, is subject to all the legal defenses which might be interposed against the note in the hands of the original payee. *Randall Co. v. Glendenning*

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BONDS—See "Attachments," 2; "Reformation of Instruments."

BRIEFS—See "Appeal and Error."

BROKERS:

1. **Real Estate Agent—Fraud—Concealment of Commission from Principal.** Where a real estate agent, having authority to make a sale of his principal's land, reports to another agent of the principal that he can sell the land so as to net the principal a certain sum, and that he is making the sale for a greater sum, thereby disclosing that the amount which will be paid to the principal is not the full purchase price, but that the excess will be retained by the agent as his commission, and no contract is shown between the principal and agent that he shall receive any specified amount for his services, although the amount of the excess is not disclosed, the agent commits no fraud or deception by not disclosing the amount of such excess. *Deming Inv. Co. v. Meyer*.....
2. **Authority to Sell—Requisites.** The written authority of an agent to sell real estate and bind the owner by an executory contract must be certain and specific as to terms and description. *Lumber Co. v. Pyles*
3. **Same—Construction of Authority.** A letter written by an owner of real estate to a real estate broker, placing the property in the hands of the broker for sale, will ordinarily be construed as an authority to the broker to find a purchaser, and not as an authority to sell and bind the owner. *Id.*.....

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C.

CARRIERS:

1. **Passengers—Personal Injuries—Pleading Rules and Regulations.** Where the plaintiff sues a carrier of passengers for injuries alleged to have been received by him by the negligence of the carrier while riding on a baggage car, the carrier must plead its rules and regulations relating to passengers and where they may ride, and allege the violation thereof by the plaintiff, if it desires to avail itself of such a defense. *Lane v. Railroad Co.* 324
2. **Same—Contributory Negligence.** It is not, under our statutes, negligence *per se* for a passenger on a mixed railroad train to occupy a seat in a baggage car. *Id.* 324
3. **Same—"Proper Accommodations."** It is the duty of a carrier of passengers for reward to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and "proper accommodations" means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers. *Id.* 324
4. **Same.** A carrier of passengers for hire is not allowed to overcrowd its vehicles or cars, and a passenger who goes upon a train for passage is not negligent in occupying a position in the baggage compartment of a combination car, where there are no unoccupied seats in the passenger compartments or coaches. *Id.* 324
5. **Same.** In order to absolve itself from liability for injuries to a passenger riding in its baggage car, the carrier must adopt and post in a conspicuous place in its passenger cars printed rules and regulations forbidding or warning passengers not to ride in such baggage car, and must, in addition to such notices, provide such passenger with proper accommodations in the passenger cars. *Id.* 324
6. **Same—Questions for Jury.** Where a carrier is operating a mixed train, and a passenger goes upon such train with his ticket for passage and finds no vacant seats in the passenger cars, or there are no printed rules posted in the passenger coaches in such train, warning passengers not to ride in baggage cars, it is not negligence for such passenger to take a seat in a baggage car; and the questions of whether the train was overcrowded or the rules posted, if controverted, are questions for the jury and not the court. *Id.* 324
7. **Injury to Freight—Connecting Carriers—Presumptions.** Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier. *Railway Co. v. McGivney*..... 361

CARRIERS—Continued.

8. **Same—Initial Carrier—Duty of Delivery.** If a common carrier accepts freight for a place beyond his usual route he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery. *Id.* 361
9. **Same—Rights of Shipper—Information of Injury.** If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, the shipper may demand satisfactory information from the first carrier that the injury or loss did not occur on its line, and if such carrier fails to furnish within a reasonable time, the proof in its possession or its control, tending to show that it was not responsible for the injury or loss, it will be held liable therefor, regardless of whether or not it was in fact responsible for such injury or loss. *Id.* 361
10. **Same.** The right of a shipper, under section 511 of the Statutes of Oklahoma of 1893, to demand of a first carrier proof that loss of or injury to freight addressed to a point beyond its usual route, where it has been delivered to a connecting carrier, to the effect that the loss or injury did not occur on its line, does not prohibit a shipper in the first instance, without such demand, from bringing an action for damages for an alleged loss or injury. *Id.* 361
11. **Same.** The purpose of the statute is to put the shipper in possession of the information which is in the possession or under the control of the first carrier so that he may determine what carrier caused the injury, and obtain satisfaction therefor without being compelled to bring a multiplicity of actions. *Id.* 361

CASE-MADE—See "Appeal and Error."

CHECKS—See "Bills and Notes."

CHILDREN—See "Parent and Child."

CONDEMNATION—See "Eminent Domain."

CONSIDERATION—See "Bills and Notes," "Mortgages."

CONTRACTS—See "Covenants," "Crops," "Evidence," "Guardian and Ward," "Interest," "Principal and Agent," "Specific Performance."

1. **Legality—Public Policy—Railroad Bonus—Subscription in Aid.** A railroad company, for the purpose of aiding the construction of its line of road, may accept and enforce an obligation payable to it, conditioned that the note shall become due and payable when the line of road is built and put in operation to a point named therein, and such a note is not void or against public policy. *Guss v. Federal Trust Co.* 138

CONTRACTS—Continued.

2. **Same—Parties to—On Whom Binding.** One who is not privy to a contract cannot be bound thereby against his consent to his detriment, nor can he claim the benefit of any of its favorable provisions. *Id.*..... 138

CONTRIBUTORY NEGLIGENCE—See "Carriers," "Street Railroads."

CORPORATIONS—See "Appeal and Error," 10.

COSTS—See "Sheriffs and Constables."

COUNTIES—See "Taxation."

Powers—Incurring Debts—Kiowa-Comanche Country. By the provisions of the act of congress approved March 3, 1901, (31 Stat. 1093) the board of county commissioners of Comanche county, Oklahoma, had no power or authority to allow any claim against the county revenues and issue a warrant prior to December 15, 1903, unless the contracting or incurring of such indebtedness was first authorized by the secretary of the interior. *Bank v. Eckles* 159

COUNTY COMMISSIONERS—See "Taxation."

COUNTY SEATS—See "Evidence," 2.

COURTS—See "Justices of the Peace," "Receivers," "Taxation."

1. **Jurisdiction.** Where a court has jurisdiction over the persons to an action, by legal service or voluntary appearance, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action and power to render any rightful judgment therein. *Crutcher v. Block* 246
2. **Records—Mistakes—Amendment by Nunc Pro Tunc Order.** On proper application and notice, a court may, by nunc pro tunc order, cause its records to speak the truth and be amended so as to record any part of the proceedings had in a cause which by inadvertence or mistake the clerk has omitted to record. *In re McQuown* 347
3. **Corrections of Record, When—Nunc Pro Tunc Order.** A person interested in the proceedings of a court of record may appear before the court at any time and ask to have the journal of the court made correct and complete as of the date such record should have been made, and the court should entertain and hear such motion upon notice given to those adversely interested. Where the default was that of the court or its officers, it is the duty of the court to make its record complete at any subsequent date when the default is called to its attention without the formality of a motion. *County Commissioners v. Kansas*..... 375

COVENANTS:

1. **Construction—Usage—Restrictions Not Favored.** Restrictions and prohibitions of the use of real property are not favored

COVENANTS—Continued.

- in the law, and the terms of such covenants will not be enlarged by implication, but confined to their accepted usage and the clear intention of the parties expressed therein. **Test Oil Co. v. La Tourette** 214
2. **Same.** The intention of the parties, being clearly expressed in the terms of a covenant to prohibit the drilling of oil and gas wells upon a certain tract in all deeds for the conveyance of any and all portions thereof, will not be enlarged by implication to include the prohibition in a lease on said tract. **Id.**..... 214
3. **Same—Deed—Lease—Covenant Construed.** The following covenant in an oil and gas lease, being a restriction upon the alienation of the land and clearly expressing the intention of the parties, will be strictly construed: "Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them for any part of said La Tourette's Second Addition to said town of Cleveland prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second Addition." **Held**, that the general usage and acceptance of the term "deed" in the above clause clearly expressing the intention of the parties, did not include "lease," and thereby prohibit the first parties from leasing said tract for the purpose of drilling oil and gas wells thereon. **Id.** 214
- CRIMINAL LAW—See particular offenses: "Homicide," "Larceny," "Obscenity."**
1. **Accomplices—Evidence —Corroboration — Sufficiency — Larceny.** Evidence of witnesses other than accomplices examined: **Held**, to be sufficient to tend to connect the defendant with the commission of the offense. **Barbe v. Territory** 119
2. **Appeal—Instruction—Harmless Error.** Where one is on trial for a crime which is divided into degrees, and the court commits error in instructing the jury upon the law applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury returns a verdict of guilty of the lower degree, the defendant cannot complain. One can only complain of errors which may have affected his rights. **Loudenback v. Territory** 199
3. **Same—Evidence—Conversation of Defendant.** A prosecution may, on a trial, show by the testimony of other witnesses a conversation between a defendant and another party; and it may prove the statements made by both the defendant (which are in the nature of admissions against his interests) and by the other party to the defendant. But it is for the jury to say, from all of the conversation, as to whether or not the statements made by the defendant are admissions against his interests. **Id.**..... 199

CRIMINAL LAW—Continued.

4. **Same—Sufficiency of Evidence.** A verdict will not be set aside for lack of evidence where the evidence reasonably supports it. *Id.* 199

5. **Verdict—Impeachment by Juror—Public Policy.** Upon the trial of a criminal cause, a juror who participates in the verdict will not be permitted to impeach his verdict by affidavit, deposition, or sworn statement. Public policy forbids that a juror should be heard to discredit his verdict. *Barnes v. Territory*..... 373

6. **Same—Remarks by Judge—Harmless Error.** An erroneous statement of the law, made by the trial judge in a colloquy with counsel during the argument to the jury, will not be sufficient grounds upon which to set aside the verdict, where it is obvious from the entire record that it could not have prejudicially influenced the verdict. *Id.* 373

7. **New Trial—Newly Discovered Evidence — Insufficiency of.** A motion for a new trial upon the ground of newly discovered evidence, made after the term at which the defendant was convicted and sentenced, which motion sets forth the evidence relied on, is not sufficient to justify a new trial of the cause, unless from a consideration of it the court can determine that the result of the trial would probably have been different had such new evidence been heard upon the trial. *Flohr v. Territory* 414

8. **Dismissal as to One Defendant—Waiver by Co-defendant of Objection.** Where two or more persons are included in the same indictment, the court may, at the request of the county attorney, dismiss as to any defendant for the purpose of making him a witness at any time in the trial before the defendants have gone into the defense; and where this is done after the jury are empaneled and sworn to try the case against all the defendants, and where the other defendants make no objection and save no exceptions, the same cannot be assigned as error in the supreme court. *Steudle v. Territory* 492

9. **Jury—Correction of Verdict—Insertion of Names.** Where a jury in a criminal case have been ordered by the court in case they agree upon a verdict during the recess of the court to have the verdict so agreed upon signed by their foreman, sealed in an envelope and delivered to the foreman, and then are allowed to separate to meet at the convening of court at their jury rooms, and where the jury do so agree upon a verdict, and separate and at the next convening of court bring in a sealed verdict, which, on being opened, is found defective for the reason that it does not name the particular defendants found to be guilty, and where the court has ordered the jury to retire and correct their verdict by inserting the names of such defendants as they find guilty, and the jury do so retire and correct their verdict and return the same into court, such action of the court does not constitute reversible error. *Id.* 492

CRIMINAL LAW—Continued.

10. **Review on Appeal—Sufficiency of Evidence.** Where there is evidence which reasonably tends to support the verdict of the jury, and such verdict is sustained by the court in refusing to grant a new trial, this court will not reverse the case on a question of fact. *Id.* 492
11. **Testimony of Accomplice—Corroboration Required.** One accused of a crime cannot be convicted upon the uncorroborated testimony of an accomplice, and the corroboration required must be the proof of substantial facts tending to incriminate the accused, aside from and without the aid of the testimony of the accomplice. *Cooper v. Territory* 496
12. **Same—Weight of Evidence.** Where there is competent corroborating evidence tending to connect the accused with the commission of the crime charged, the weight of such evidence is a matter for the jury; but, where the corroborating evidence is of such an uncertain and unsatisfactory character as not to warrant a reasonable inference of guilt, the court should set aside the verdict. *Id.* 496

CROPS:

- Cropper's Contract—Rights Conferred.** A cropper's contract, whereby one agrees to cultivate the land of another and is to receive as compensation therefor a share of the crops grown, does not create the relation of landlord and tenant. Except where it is otherwise provided therein, such a contract grants possession of the land only as an incident to the work that is to be performed, and confers no general right of occupancy of and control over the land cultivated. *Moore v. Linn*..... 279

CROSS-PETITION—See "Pleading."

D.

DAMAGES—See "Abatement and Revival," 1, 2; "Eminent Domain."

DEATH—See "Abatement and Revival," "Principal and Agent."

DEEDS—See "Adverse Possession," "Covenants," "Taxation."

DEMURRER—See "Pleading."

DISCRETION OF COURT—See "Evidence," "Injunction," "Trial."

DISMISSAL—See "Criminal Law," 8.

DIVORCE:

1. **Service by Publication—Affidavit—Case.** An affidavit in an action for divorce, as a basis for service for publication, in the following form: "Salia M. Cordray, being first duly sworn, upon oath says that she is the plaintiff in the above entitled

DIVORCE—Continued.

- cause, and that defendant, J. W. Cordray, is not a resident of the territory, but to the best of her knowledge and belief is a resident of and that service of summons in this case can not be had upon the said defendant in the territory of Oklahoma," does not comply with the provisions of the statute and a judgment rendered in such case is void for want of jurisdiction over the defendant. *Cordray v. Cordray* 36
2. *Same*. Such affidavit is defective, first, in that it fails to state what, if any, diligence was used to procure personal service of summons upon the defendant; second, in that it fails to state the nature of the action; third, that it fails to state that at the time of the making of the affidavit the defendant was out of the territory of Oklahoma. *Id.* 36

E.

ELECTION OF REMEDIES—See "Abatement and Revival," 1, 2..

EMINENT DOMAIN—See "Abatement and Revival," 1, 2.

1. **Procedure—Entry on Land—Damages—Remedies of Landowner.** The statute of Oklahoma authorizing railroad corporations to exercise the right of eminent domain and providing the procedure by which the damages to the landowner may be ascertained and giving to the owner of the property as well as the corporation the right to institute such proceedings, does not provide an exclusive remedy, but the common law remedy afforded the owner in such cases may be pursued, at the election of the landowner, where his property is entered upon and appropriated for railway purposes. *Railway Co. v. Bebout* 63
2. **Damages, Measure of—Scope of Evidence.** In determining the damages to private property caused by the exercise of the right of eminent domain for a right of way for railroad purposes, testimony showing the excavations, embankments, and obstructions to the natural flow of surface water necessarily caused by the construction of the road is properly admitted for the purpose of showing in what way and to what extent the remaining portion of the uncondemned tract has been damaged by reason of construction of the road. *Railway Co. v. Witt*..... 262
3. *Same*. Under the statute of Oklahoma, damages in condemnation proceedings for railroad right of way purposes are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by the appropriation of his land and by reason of such railroad. *Id.* 262

EQUITY—See "Injunction," "Mortgages," "Public Lands," "Reformation of Instruments."

ERROR, WRIT OF—See "Appeal and Error."

ESTOPPEL—See "Bills and Notes."

EVIDENCE—See "Adverse Possession," "Appeal and Error," "Attachment," "Bills and Notes," "Criminal Law," "Eminent Domain," "Mortgages," "Pleadings," "Witnesses."

1. **Parol Evidence—Written Contract—Supersession of Oral Negotiations.** Under the laws of this territory, the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject matter which preceded or accompanied the execution of the instrument; hence, where a note is given as subscription to a railroad corporation to aid in the construction and building of said road, any representation made prior to or contemporaneous with the execution of the note are inadmissible to contradict, change, vary, or add to the conditions plainly incorporated into and made a part of said note. *Railroad Co. v. Rhodes* 21
2. **Judicial Notice—County Seats De Facto—Validity of Court Proceedings.** Courts of record in any county will take judicial notice of the county seat of such county, and, if the seat of public business in any county is the county seat *de facto*, such courts will take notice thereof, and the validity of the proceedings of such courts transacted at the county seat *de facto* cannot thereafter be questioned in a collateral proceeding. *County Commissioners v. Kansas* 375
3. **Parol Evidence Contradicting Written Contract.** A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts. *Garrison v. Kress* 433
4. **Merger of Oral Negotiations.** The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. *Id.* 433
5. **Experts—Definition.** An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons. *Yates v. Garrett*.... 449
6. **Same—Expert Knowledge—Reception.** Where the testimony of a witness shows him to be an expert in the matter concerning which he gives his opinion, *Held*, that this testimony was properly received as that of an expert, although he, for some unexplained reason, disclaimed being such. *Id.* 449
7. **Same—Preliminary Question—Discretion of Court.** Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the

EVIDENCE—Continued.

court, and the rule is, if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence, but the supreme court will not reverse any such a case unless the ruling is manifestly erroneous. *Id.*.....

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EXCEPTIONS—See "Appeal and Error."

EXCEPTIONS, BILL OF:

1. **Necessity—Evidence Before Referee — Preservation.** Where a referee for the trial of a cause in the district court is not ordered to report the evidence, but is ordered to hear the evidence and report his findings of fact and conclusions of law, the evidence so taken can only be made a part of the record and subject to review by the trial or supreme court by having the referee for the trial of a cause in the district court is taken by him. *Block v. Pearson* 422
2. **Same—Findings of Referee—Conclusiveness.** Where the evidence taken upon a trial before a referee is not made part of the record, the findings of such referee are conclusive upon the parties as well as the court, and cannot be reviewed. *Id.*..... 422
3. **Same—Preservation of Record.** Where a party desires to have the proceedings before a referee reviewed, he should file a motion for new trial before the referee, and have the same ruled upon before the report of the referee is filed in court; and, in order to preserve a record before a referee, a bill of exceptions should be prepared and presented to the referee for his allowance and signature, to be filed in court with his report. *Id.*..... 422

EXECUTIONS:

Ancillary Proceedings—Property Applicable to Judgment Upon Order.

Under proceedings in aid of execution based upon a showing that the judgment debtor has in his possession and under his control property not exempt from execution which he refuses to apply in payment of the judgment, the court is not authorized to make an order directing the judgment debtor to apply property, the title to which is shown to be in a third party. The judgment debtor can only be ordered to apply property, the title to which is in him, and which he is competent to deliver. *Ryland v. Milling Co.* 435

EXEMPTIONS—See "Homestead," "Jury," "Public Lands."

EXPERT TESTIMONY—See "Evidence."

F.

FEES—See "Sheriff and Constable."

FINDINGS—See "Appeal and Error," "Trial."

FRAUD—See "Brokers," "Judgment," "Mortgages," "Physicians and Surgeons," "Vendor and Purchaser."

G.

GUARDIAN AND WARD:

Power of Guardian—Contract to Sell Land—Approval of Court. An agent or guardian of an infant owner of real estate has no power to make an executory contract for the sale of the infant's real estate. Such a sale can only be made upon an order of the probate court and subject to the court's approval. **Lumber Co. v. Pyles**

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H.

HABEAS CORPUS—See "Jury."

HOMESTEAD.

Exemption—Tort of Father. The homestead of the family is exempt to the family and cannot be taken on attachment for the tort of the husband and father. **Cassady v. Morris**

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HOMESTEAD ENTRY—See "Public Lands," "Specific Performance."

HOMICIDE:

Indictment—Error Not Reversible, When. Where one is indicted for murder, but the indictment, although sufficient to charge manslaughter in the second degree, is not a good indictment for either murder or manslaughter in the first degree, and the defendant is put on trial for murder, and the jury return a verdict of manslaughter in the second degree, the defendant cannot complain that he was tried upon the theory that the indictment was a good indictment for murder, unless it appears from the record that the defendant may have been prejudiced thereby; and prejudice will not be presumed from the fact alone that the prosecution and the court proceeded upon the theory that the indictment was a good indictment for murder. **Loudenback v. Territory**

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HUSBAND AND WIFE:

Presumption—Agency. Where a wife requests medical treatment for an infant, it will be presumed, in the absence of proof, that she is acting as the agent of her husband; but such presumption may be overcome by evidence. **Howell v. Blesh**

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I.

INDEBTEDNESS—See "Counties."

INDICTMENT AND INFORMATION—See "Homickie," "Larceny," "Obscenity."

INJUNCTION—See "Intoxicating Liquors."

1. **Dissolution at Chambers Upon Defendant's Motion—Evidence—Review—Harmless Error.** A district judge at chambers (proper notice having been given of the time and place of hearing) has power to dissolve a temporary injunction, even though it was granted upon a hearing at which both parties were present. The statute of Oklahoma, which provides that where a temporary injunction is granted without notice to the defendant, he may upon notice apply to have the same dissolved, confers upon the defendant the right to be heard by the court or judge upon such motion, and is not intended to prohibit the court or judge, in the exercise of discretionary powers, from hearing such a motion where the temporary injunction was granted upon notice in the first instance. This court will not reverse an order made by the judge of a district court at chambers on account of error in admitting or excluding evidence on a motion to dissolve a temporary injunction, unless such error affects the substantial rights of the party appealing. *Brown v. Donnelly* 296
2. **Same—Public Land—Contest—Power of District Court.** Where two persons are contesting in the land department over a tract of government land, and each is in possession of a portion thereof, the district court cannot, under the rules of equity jurisdiction, by mandatory injunction, take the land in the possession of one of the contestants and give it to the other. *Id.*..... 296
3. **Temporary Orders—Modification.** All orders made by a district court, or a judge thereof, on a hearing for a temporary injunction or on a motion to dissolve the same, in so far as they affect the subject in controversy, are only temporary and may be modified in the final judgment, giving to the respective parties that order or judgment which the rules of equity require. *Id.* 296
4. **Same—Case.** Where two persons are contesting in the land department for a tract of government land, and one obtains by mandatory injunction land which was in the possession of the other, and plants the same to corn, and, before the corn is harvested, the judge of the district court dissolves the temporary injunction and orders the crop divided, this court will not reverse such order dividing such crop unless, from the evidence, it can be said that the trial judge exceeded his authority. The order so dividing the crop on the motion to dissolve the hearing is not a final judgment, and the rights of the parties to the corn may be litigated on the final trial, each being accountable for that portion of the crop which he received. On the final hearing all

INJUNCTION—Continued.

of the issues involved in the case may be litigated, and judgment rendered declaring the rights of the respective parties in relation thereto. *Id.*

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5. **Granted Pendente Lite—Discretion of Court.** The granting of temporary injunctions *pendente lite* is largely within the discretion of the court, and appellate courts will not vacate such orders on appeal unless there has been a clear abuse of discretion, or the same is granted without authority. *Severns v. English*

567

INSTRUCTIONS—See "Criminal Law."

INTENT—See "Larceny."

INTEREST—See "Appeal and Error," 1, 2.

Guaranty—Limitation of Amount—Judgment to Conform. Where a contract of guaranty limits the amount of the indebtedness to be paid, and provides that it shall be without interest, it is error to include interest before judgment in the assessment of the amount of recovery. *Dunlap v. Stannard*

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INTOXICATING LIQUORS:

1. **License—Refusal by City.** Where a dealer in intoxicating liquors has obtained a county license authorizing him to sell such liquors within a city of the first class, such city has no power to refuse a city license to such person upon presentation of his county license, filing his bond with the county clerk, and paying to the city treasurer the amount required by the city ordinance for such license. *Territory v. Robertson*
- 149
2. **Same—Qualifications of Licensee—City Cannot Prescribe Additional.** The qualifications of one who has obtained a county license has been determined, and the mayor and city council of a city of the first class have no power to by ordinance prescribe additional qualifications. *Id.*
- 149
3. **Same—Municipal Regulation of Sale.** The mayor and city council of a city of the first class may by ordinance regulate the places where intoxicating liquors are sold and may designate the portions of such city where saloons may be conducted and where they may not, and an applicant for county license in such city must take notice of such ordinance when properly enacted and published. *Id.*
- 149
4. **Same—Unlawful Sale—Nuisance.** The unlawful sale of intoxicating liquors does not *per se* constitute the place where such liquors are sold a public nuisance. The character of the place must depend upon the special facts, which must be specifically averred and proved. *Id.*
- 149

INTOXICATING LIQUORS—Continued.

- 5. Same—Abatement and Injunction.** There is no statute in this territory authorizing a court to proceed by injunction to restrain the unlawful sale of intoxicating liquors, and a court of equity will not interfere upon the bare fact alone that the place where liquors are sold is unlicensed. *Id.* 149

IRRIGATION—See "Waters and Water Courses."

J.

JUDGES:

- Change of Judges—Order—Powers of Substituted Judge.** Where an application for change of judge is granted on March 22, 1905, and the clerk of the district court of Comanche county is ordered to notify the clerk of the supreme court at Guthrie of such change of judge; and where, on the same day, at Woodward, Oklahoma, at chambers, an order is made by the chief justice assigning another judge to "hold the district court in the county of Comanche * * * and to try, hear and determine any and all cases and matters that may come before him in said district during the absence" of the regular presiding judge therefrom—*Held*, the judge so assigned has jurisdiction to try, hear and determine any case or matter which may come before him while acting under such order of the chief justice. *Barbe v. Territory* 119

JUDGMENT—See "Appeal and Error," 2; "Pleading."

- 1. Fraud—Vacation—Time for Application.** A judgment of a court of record, obtained and procured to be entered by reason of the fraud and deceit of the party benefited thereby, is voidable at the suit of the judgment debtor, which suit may be maintained under the provisions of section 18 of the Code (Wilson's Rev. & Ann. Stat. 1903, sec. 4216), within two years after the date of the discovery of the fraud. *City of Guthrie v. McKennon* 306
- 2. Same.** The provisions of sections 562 and 569 of the Code, which limits the time in which a procedure thereunder may be instituted to reverse, vacate, or modify a judgment to two years from the date of the judgment, does not apply so as to estop the bringing of an equitable action to cancel a judgment on the ground of fraud within two years from the date of the discovery of such fraud. *Id.* 306
- 3. Same—Pleading—Defective Petition.** In an action to set aside a judgment on the ground of fraud practiced in procuring the same, where the petition alleges and shows that judgment has been obtained upon a chose in action which the party obtaining such judgment did not at the time own, but that the same was owned and had been reduced to judgment by a third party, and where by such petition it is shown that the petition upon which the alleged fraudulent judgment was entered set out that such third

JUDGMENT—Continued.

party claimed some interest in the chose in action with reference to which the plaintiff was not fully advised, and prayed an order that such third party be impleaded and brought in, that the right of all the parties might be fully adjudicated, which petition was verified, such verification reciting the fact that the plaintiff was the owner of the chose, except such interest as such third party might have therein. **Held**, that such petition does not state a cause of action, because it appears therefrom that the plaintiff had notice of such facts and circumstances as would put a person of ordinary prudence upon inquiry, which inquiry would have disclosed the defense, if any, the defendant in such action might have. *Id.* 306

4. **Res Adjudicata—Validity of Bond Issue—Procedure.** Where a court of competent jurisdiction has determined the validity of the bonds involved in a proceeding provided by the statute, and has decreed that the bonds were valid obligations and issued in strict conformity with the laws of the territory, and no objection or exception was taken therefrom, the decree and judgment of the court is final and conclusive upon all matters put directly in issue, tried and determined in that proceeding. (Following *Territory v. Jones*, 9 Ok. 133, 59 Pac. 976.) **County Commissioners v. Kansas** 375

5. **Motion to Vacate—Time of Decision—Subsequent Term.** Under the statutes of this territory, the district court has power to vacate or modify its own judgments or orders at or after the term at which said judgment or order was made. Where the allegations to vacate a judgment are based upon division 3 of section 562 of chapter 66 of Wilson's Statutes of Oklahoma, 1903, for irregularity in obtaining a judgment or order, and where the motion to vacate the judgment is made at the same term at which the judgment was rendered, a reasonable notice being given to the adverse party or his attorney, the court has jurisdiction to hear the matter, although the motion is not decided until a subsequent term. **Stark Bros. v. Glaser** 502

JUDICIAL NOTICE—See "Attorney and Client," "Evidence."

JURISDICTION—See "Courts," "Judges," "Physicians and Surgeons," "Process," "Taxation."

JURY—See "Criminal Law," "Physicians and Surgeons."

1. **Right to Jury Trial—Exemptions.** A motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury. **Cassady v. Morris**..... 203
2. **Trial by Jury—Cannot be Waived, When.** One who is charged with a crime triable by a jury at common law is required by our statute to be tried by a jury, and cannot waive such right. A judgment of conviction, pronounced by a court upon a plea of

JURY—Continued.

not guilty, without the intervention of a jury is void; and a person imprisoned upon such judgment is entitled to his discharge upon habeas corpus. *In re McQuown* 347

JUSTICES OF THE PEACE:

Judgment—Appeal—Taken to Probate Court, When. Under the provisions of section one of article nine of chapter twenty-eight of the Session Laws of Oklahoma of 1905, which provides that "In all cases not otherwise especially provided for by law, either party may appeal from the final judgment of the justice of the peace to the probate court of the county where the judgment was rendered," etc., an appeal may be taken from a judgment of a justice of the peace to the probate court only when the judgment is by confession or where there has been a jury trial and neither party claimed more than twenty dollars in his bill of particulars, as all other appeals were already provided for, in that the statutes in force at the time the section above quoted was enacted required that appeals, other than those named herein, be taken from the justice's court to the district court. *Canadian Coal Co. v. Eldridge* 230

L.

LACHES—See "Mortgages."

LANDLORD AND TENANT:

Breach of Lease—Abandonment—Remedies of Landlord. If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may, at his election, at once enter and terminate the contract and recover the rent due up to the time of abandonment, or he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages. *Higgins v. Street* 45

LARCENY:

Indictment—Felonious Intent. In a prosecution for larceny of domestic animals, an indictment which charges that the defendants "did then and there unlawfully, willfully and feloniously, by stealth, take, steal and carry away, without the consent and against the will of the true owner," certain personal property "with the unlawful and felonious intent then and there" of the defendants "to deprive the said L. C. Knee thereof and to convert the same to their own use and benefit," sufficiently charges a felonious intent to convert. *Barbe v. Territory*..... 119

LEASES—See "Covenants," "Landlord and Tenant."

LICENSES—See "Intoxicating Liquors," "Physicians and Surgeons."

LIENS—See "Mechanics' Liens."

LIMITATION OF ACTION—See "Abatement and Revival," 3, 4, 5.

Suspension—Delay. A person can not prevent the operation of the statute of limitations by delay in taking action incumbent upon him. *Glazier v. Heneybuss*

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M.

MECHANICS' LIENS:

1. **Right to Lien—Subcontractor of a Subcontractor Not Entitled to.** A subcontractor of a subcontractor is not entitled to a lien on a building under the provisions of the statutes of Oklahoma of 1893 regarding "liens of mechanics and others." The right to a lien under such statutes is confined to artisans, laborers, contractors and subcontractors. *Vandenberg v. Lumber Co.*

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2. **Same—Claims Against Subcontractors—Rights and Duties.** When a contractor for the erection of a building lets a sub'contract to a portion thereof, and the subcontractor permits liens to be filed against the building, the contractor is not required under the law to defend against the respective amounts of such liens. It is the duty of the subcontractor and those claiming liens under him to defend against the allowance by the court of excessive or unjust claims. The contractor, under such circumstances, may refuse to pay any lien claimant the amount of his lien until after he establishes the correctness thereof in court, and before a proper court adjudicates the correctness of the same the contractor would pay it at his peril. *Id.*

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3. **Same.** An original contractor is entitled to have all of the terms and conditions of a contract with a subcontractor fulfilled for the amount stated therein; and, when liens are filed against the building involved, it is the duty of the original contractor to advise the court by proper pleadings and proof as to the terms and conditions of the contract, the amount of money advanced thereunder, and of the balance due or to become due, together with such other information as will enable the court to properly dispose of the liens. If he does this, and then pays out such sums as the court may direct to the persons named by the court after the liens have been established, and the amount due from the subcontractor to the lien claimant has been duly decreed by the judgment of the court, he will be subject to no further liability in relation to such liens. *Id.*

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4. **Same.** It is the duty of a person claiming a lien under a subcontractor for labor performed on a building to first established by a judgment of court the amount due from the subcon-

MECHANICS' LIENS—Continued.

tractor to him, and to secure a decree establishing the lien before the original contractor is under any moral or legal obligations to pay the lien claimant the same; and, even then, due regard must be had for the amount of the contract under which the labor has been performed, and also as to whether or not the terms and conditions of the contract have been fulfilled, as it is not the intention of the law to require the one letting such a contract whether he be the owner or original contractor, to pay more than the contract calls for in compensation for the services to be rendered. *Id.*.....

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5. **Materialman's Lien—Government Land—Leasehold Estate.** Where one causes to be erected a building on real estate in his possession, and material furnished for such purposes is not paid for, a materialman's lien may be had under the laws of Oklahoma, even though the person for whom such building was erected is not the owner of a perfect legal title. A leasehold estate (if the building is erected within the authority conveyed by such instrument) is a sufficient title of ownership to authorize such a lien; and, in default of payment, such lien may be foreclosed and the rights of the lessee in the land or to the occupancy thereof under his lease, as well as the building, may be sold to satisfy the judgment. *Crutcher v. Block*.....

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6. **Property Subject.** By the provisions of section 4817, Wilson's Stat. 1903, one who, under contract with the husband of the owner of land, furnishes material for the erection of a building upon said land, is entitled to a lien upon such land and the improvements thereon for the amount due for such material. *Block v. Pearson*

422

7. **Same—Leasehold Estate Subject.** A lessee, who holds under a lease from the school land leasing board, is an "owner" of land as contemplated in the mechanic's lien law, and such a lien may attach to such a leasehold estate subject to the paramount interest of the United States, the lessor, or the holder of the fee. *Id.*

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9. **Property Subject to Lien—Leasehold Estate.** Under the statutes of this territory a mechanic's lien will attach in any proper case to a leasehold estate; and the fact that the tenant may have the right to remove his building, fixtures and machinery from the leased premises, instead of lessening the lien, or preventing it from attaching to the leasehold estate, will, as we think, enlarge the lien, and enable the lienholder to obtain a greater interest in the leased premises. Neither will the fact that for some purposes, and under some circumstances, the buildings, fixtures and machinery put upon the leased premises by the tenant may be considered as personal property, have the effect of preventing the lien from attaching. *Jarrell v. Block*....

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MISREPRESENTATION—See "Bills and Notes," 1.

MORTGAGES:

1. **Foreclosure—Defenses—Fraud and Want of Consideration.** Where a mortgage on real estate is executed without consideration, and by reason of fraudulent representations made by the mortgagee to the mortgagors, such fraud and want of consideration may be shown at any time by the mortgagors in an action by the mortgagee to foreclose. *Alton-Dawson Merc. Co. v. Staten*.... 252
2. **Assignment—Execution—Record—Notice.** The recording of an assignment, by a corporation, of a mortgage, without the attesting of the secretary of said corporation, as required by running section 921, page 331, Wilson's Statutes of Oklahoma 1903, is not constructive notice. *Randall Co. v. Glendenning* 475
3. **Absolute Deed as Mortgage—Extraneous Evidence.** When the question before a court of equity is whether a deed which purports upon its face to be an absolute deed was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage. *Wagg v. Herbert* 526
4. **Same—Substance and Effect of Instrument.** Where a transaction was in substance and effect a loan of money upon the security of a farm, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it and declare the conveyance of the land to be a mortgage. *Id.*.... 526
5. **Same—Fraud and Undue Influence.** A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no undue influence or unconscionable advantage has been taken of his position by the mortgagee; but to insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be. *Id.*..... 526
6. **Same.** Where a mortgagee purchases the premises of the mortgagor, and the evidence discloses that fraud was committed and undue influence was used, and where the transaction shows that it was unfair and an unconscionable advantage has been taken by virtue of the position of the mortgagee, a court of equity will decree a deed, which is absolute on its face, to be a mortgage. *Id.* 526
7. **Same.** A sale of property to a mortgagee is to be scrutinized to see whether any undue advantage has been taken of the mortgagor, and especially is this necessary when the mortgagee in the inception and throughout the whole conduct of the business has shown himself ready and skillful to take advantage of the necessity of the borrower. *Id.* 526
8. **Same—Adequacy of Consideration.** In determining the question whether the transaction was a sale or a mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale. *Id.*..... 526

MORTGAGES—Continued.

9. **Same—Laches—Acquiescence.** Under the circumstances of this case, the plaintiff was not guilty of such laches or acquiescence as would preclude her from asserting her equitable rights under the well-settled principles of equity jurisprudence. *Id.*..... 526

MOTIONS—See "Injunction," "Judgment," "Jury," "Pleadings."**Conclusiveness of Adjudication—Order—Motion to Quash Service.**

Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and if no appeal is taken, the matter arising on the motion to quash service becomes *res adjudicata* and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject matter. *Rogers v. Mercantile Co.* 115

MUNICIPAL CORPORATIONS—See "Intoxicating Liquors."**N.****NEGLIGENCE—See "Carriers," "Street Railroads."****NEW TRIAL—See "Appeal and Error," "Criminal Law."**

- Grounds For—Death of Stenographer.** The district court is only authorized to grant new trials for the causes, in the manner, and within the time set forth in the statute, and it is manifest and material error to grant a new trial for the reason the complaining party is unable to procure anyone who can transcribe a deceased stenographer's shorthand notes of the proceedings on the trial. *Butts v. Anderson* 367

NOTES—See "Bills and Notes."**NOTICE—See "Mortgages," 2.****NUISANCE—See "Intoxicating Liquors."****O.****OBSCENITY:**

1. **Offense Against Public Morals—Evidence—Case.** One Besse Patterson applied to the defendant, W. H. Gunn, at his office, for employment as an office girl. The two were in the office alone. The defendant requested the prosecutrix to submit to a physical examination in order that he might determine if she was virtuous, and upon her refusal he ran his hands under her clothes and placed them upon her lower limbs and used vile, indecent, lewd, and lascivious language to her. Held, that such acts did not constitute a violation of section 2552 of the Statutes of Oklahoma of 1893, which makes it a misdemeanor to "willfully

OBSCENITY—Continued.

and wrongfully commit any act * * * which openly outrages public decency, and is injurious to public morals." The acts complained of were not open or public, and did not outrage public decency nor injure public morals, but constituted a personal injury inflicted privately. *Gunn v. Territory*..... 240

2. **Same.** The section of the statute under which the defendant was convicted is intended to cover only those acts for the punishment of which no other penalty is by statute provided. *Id.* 240

OIL AND GAS—See "Covenants."

ORDERS—See "Appeal and Error," "Courts," "Execution."

P.

PARENT AND CHILD:

Parent's Liability for Medical Expenses. A father is liable for medical or surgical services rendered his child at the request of his duly authorized agent; also, for hospital service received under similar circumstances. *Howell v. Blesh* 260

PARTNERSHIP:

1. **Rights and Liabilities as to Third Persons—Obligations—Nature of Partner's Authority.** Under the provision of section 3879, Wilson's Rev. & Ann. Stat. 1903, a partnership obligation executed by one partner without the knowledge or consent of the other binds the firm and each general partner, if the obligation so executed is within the reasonable conduct of the partnership business. *Chapek v. Bank* 80
2. **Same—Renewal Note—Execution for Firm.** The execution and delivery of a promissory note as a renewal of a firm obligation already outstanding and due upon which liability is admitted, is a transaction within the scope of the business of the partnership. *Id.* 80

PASSENGERS—See "Carriers."

PERSONAL INJURIES—See "Carriers."

PETITION—See "Pleading."

PHYSICIANS AND SURGEONS:

1. **License—Revocation—Jurisdiction.** The district courts have exclusive jurisdiction to hear and determine whether a license to practice medicine was fraudulently obtained. *Gulley v. Territory* 187
2. **Same—Action—Territory as Party.** The territory is not only a necessary party, but it is the proper party to institute such an action. *Id.* 187

PHYSICIANS AND SURGEONS—Continued.

3. **Same—Grounds for Revocation—Fraud.** A license to practice medicine procured through the presentation of a pretended diploma from a fraudulent medical college, without an examination, will be revoked and canceled in a proper proceeding in the district court. *Id.* 187
4. **Same—Jury—Right to Trial by.** An action to cancel a license upon the ground that it was fraudulently obtained is an equitable proceeding, and the licensee is not entitled to a jury trial as a matter of right. *Id.* 187

PLEADING—See "Carriers," "Judgment."

1. **Amendment — Status of Superseded Petition — Contents as Evidence.** Where an amended petition is filed in a cause, and no part of the original petition is referred to or adopted into the amended petition, such original petition is superseded, and is no part of the record, and, while it may be introduced in evidence by the adverse party the same as any other writing signed by the party, subject to be explained, its contents cannot be considered upon the trial either as a part of the record or as admissions of the plaintiff, unless introduced in evidence. *Lane v. Railroad*.... 324
2. **Petition—Demurrer.** Where a petition neither states a cause of action in equity or at law, demurrer thereto should be sustained. *Kimmell v. Powers* 339
3. **Cross-Petition—Answer.** Where, in answer to a petition, the defendant makes allegations proper in his answer, which alleges facts upon which affirmative relief may be based, and such affirmative relief is prayed for by such answer, the same will be treated by the court as a cross-petition, regardless of what name the pleader may apply to it. *Brown v. Massey*..... 482
4. **Same—Motions—Judgment on Pleadings.** Where a petition is filed by the plaintiff, and the defendant by his answer, in addition to the general denial, pleads facts which would warrant the granting of affirmative relief, and after filing such answer, and, before a reply is filed, the plaintiff by leave of court dismisses his action, the defendant will be allowed to pursue his remedy for affirmative relief as set up in his answer, and on a motion for judgment on the pleadings for the reason that the allegations of the answer asking for affirmative relief are undenied, the court should either sustain the motion, or rule the plaintiff to file a reply to the affirmative part of the answer so that the issue may be raised and tried by the court. A failure or refusal to do either is error, for which the case will be reversed. *Id.*.... 482
5. **Allegation of Agency — Authority — Insufficiency of Denial.** Where the allegations of the petition set up the authority of the agent, a plea denying this authority which is not in conformity

PLEADINGS—Continued.

with section 4318 of Willson's Statutes, and does not bring the plea within any of the grounds therein provided, is not sufficient to raise the issue of authority. *Railway Co. v. Mitchell* 579

POSSESSION—See "Receivers."

PRACTICE—See "Appeal and Error," "Appearance," "Criminal Law," "Injunctions," "Judges," "Mortgages," 1; "Motions," "Pleading," "Trial."

PRESENTMENT—See "Bills and Notes."

PRINCIPAL AND AGENT—See "Brokers," "Husband and Wife," "Pleading."

1. **Contract—Powers—Relationship—Case.** A contract whereby the owner of an addition to a town gives to another the management and exclusive sale of the same for a period of ten years, and agrees to pay to such person twenty-five per cent. of the proceeds of sales, after deducting the current expense, and also agrees that, if any part of the addition remains unsold at the end of that time, it shall be appraised and the owner to have three-fourths thereof and the other party one-fourth, constitutes the relation of principal and agent, and does not vest the agent with any interest in the real estate itself. *Kimmell v. Powers* 339
2. **Same—Termination of Agency—Death of Party.** Where the relation of principal and agent exists, the death of either party terminates the agency, except where the agent has a pecuniary interest of his own in the execution of the agency. *Id.* 339
3. **Authority of Agent—Sale and Collection.** Authority to an agent to sell goods does not of itself and alone apparently give to the agent authority to collect pay for the goods thus sold. *Scarritt, etc., Co. v. Hudspeth* 429
4. **Same—Burden of Proof—Collections by Traveling Salesman.** Where a traveling salesman sells goods by sample or from catalogues and price lists, sending the orders to his principal to be filled, the presumption is that such agent has not the authority to collect for such goods; and where a purchaser, subsequent to the date of ordering goods through such an agent, makes payments thereon to him, he does so at his peril, and in litigation for the value of the goods, the authority of the agent to make such collections being denied by his principal, the burden is on the purchaser to prove that the agent had such authority; and where the court instructs that such purchaser should be given credit for all payments made to such agent, unless he had notice or knowledge of the fact that such agent had no authority to collect for goods so sold, and judgment is rendered charging such payments to the seller, it will be presumed that the erroneous instructions operated to the prejudice of the seller, and a new trial should be granted by reason thereof. *Id.* 429

PRINCIPAL AND AGENT—Continued.

5. **Same—Authority to Compromise.** Authority to an agent to sell goods does not carry with it authority to compromise differences which may arise between his principal and those to whom he sells goods, by reason of the goods not coming up to the standard represented; and, where a purchaser relies upon a compromise with such an agent, the burden is on him to establish the agent's authority (if such fact be in dispute) to effect compromises in such cases. *Id.*

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PROCESS:

- Service by Publication—Strict Compliance With Statutes.** Where publication is relied on and jurisdiction is sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute. *Cordray v. Cordray*.....

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PROMISSORY NOTES—See "Bills and Notes."

PUBLICATION—See "Process."

PUBLIC LANDS—See "Injunction."

1. **Grant in Aid of Railroads—Right of Way—Homestead Entry.** A railroad company appropriating land for its right of way across a tract of land covered by the homestead entry of another becomes an unlawful trespasser and obtains no right either in law or equity to the land. *Railway Co. v. Kephart*
2. **Same.** A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it, from the public domain, and precludes it from subsequent appropriation for right of way for railroad purposes under the act of 1875, granting right of way to railroad companies through the public lands of the United States. *Id.*
3. **Cancellation of Entry—Effect on Right of Way—Case.** Where A has a homestead entry upon a tract of government land subject to homestead entry, and B enters thereon while said entry is intact, and makes settlement, and a railroad company enters and appropriates a strip one hundred (100) feet wide across said tract for its right of way, having filed its articles of incorporation and profile maps with the secretary of the interior, and the same having received his approval under the act of 1899, providing for condemnation proceedings and payment; and thereafter B, by contest proceedings in the United States land office secures the relinquishment of A to be filed in the United States land office, and immediately thereafter makes homestead entry for said tract under a preference right as successful contestant, and complies with all the provisions of

1

1

PUBLIC LANDS—Continued.

- the law to preserve said entry, Held, that the cancellation of A's entry did not cause a reversion of the right of way to the railroad company under the act of 1875, granting right of way to railroad companies through the public lands of the United States. *Id.* 1
4. **Entries—Priorities—Rights—Premature Entry.** A settlement or entry on public land already covered of record by another entry, valid upon its face, does not give a second entryman any rights in the land notwithstanding the fact that such entry may subsequently be relinquished or ascertained to be invalid by reason of facts *dehors* the record of such entry; and one first entering after the relinquishment or cancellation has priority over one attempting to enter prior to such relinquishment or cancellation. Following *McMichael v. Murphy*, 197 U. S. 304. *Holt v. Classen* 131
5. **Homestead Entry—Relinquishment—Title to Growing Crops.** Where one sows wheat on land embraced in a homestead entry under a contract that he is to have two-thirds of the crop and the entryman one-third, and before the maturity of the crop the entryman sells his improvements and growing crops to another and relinquishes his homestead entry, so that such other person may file on the land, and such other person files on the land, he acquires not only the right of possession to the land itself, but also title to all improvements and growing crops thereon. *Moore v. Linn* 279
6. **Homestead Entries—Exemptions.** Lands acquired under the provisions of the United States statute for the homesteading of public lands are not liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor. The terms of this section exempt all lands obtained under the homestead law from liability for any of the debts of the entryman prior to the issuing of the patent, whether the lands are still held by him, or by a *bona fide* purchaser deriving title through him. *Stark Bros. v. Glaser* 502
7. **Review in Equity—Decisions of Land Department.** Courts of equity will always interfere to prevent injustice and wrong after the matter has been finally determined in the land department, when there has been a manifest misapplication of the law to the facts found by such department. *United States v. Trading Co.* 585

PUBLIC MORALS—See "Obscenity."

PUBLIC POLICY—See "Bills and Notes," 2; "Contracts," "Specific Performance."

R.

RAILROADS—See "Bills and Notes," "Carriers," "Contracts," "Eminent Domain," "Public Lands."

REAL ESTATE AGENTS—See "Brokers."

RECEIVERS:

Possession of Property—Supervision of Court. Courts of equity have the power to appoint receivers, and to order them to take possession of property in controversy and to enjoin interference with the possession of the receiver, whether in the immediate possession of the defendant, or his agent, and in proper cases may order the agent or employees of defendant, though not parties to the record, to deliver the specified property to the receiver. *Severns v. English* 567

RECORDS—See "Appeal and Error," "Courts." "Exceptions, Bill of," "Mortgages," 2.

REFERENCE—See "Exceptions, Bill of."

REFORMATION OF INSTRUMENTS:

Correction of Mistakes—Equitable Relief Denied, When. Equity will not subject the property of one party to the payment of the debt of another; and a mistake will not be corrected in an equitable action, unless the plaintiff shows by his bill that without such correction it will suffer loss or injury, but even then the court will not enter a decree that will injure another in order that the plaintiff may not suffer loss. *Commission Co. v. Bank*.... 302

RELINQUISHMENT—See "Public Lands."

REPLEVIN—See "Sheriffs and Constables."

RES. JUDICATA—See "Motions," "Judgments."

REVENUE—See "Taxation."

REVIEW—See "Appeal and Error."

REVIVAL OF ACTIONS—See "Abatement and Revival."

REVOCATION—See "Physicians and Surgeons."

RULES OF COURT—See "Appeal and Error."

S.

SALES—See "Attachment," 3; "Brokers," "Mortgages," "Principal and Agent," "Taxation," "Vendor and Purchaser."

1. **Acceptance of Goods Purchased—Shipment of Goods not Purchased—Findings of Jury Conclusive.** Where an action is brought by a wholesaler against a retail merchant for the price

SALES—Continued.

- of goods sold and delivered, and the defense is that the goods not paid for were not the goods ordered, and that they were returned to the wholesale house within two weeks after they were received, and that they were never exposed for sale, and the evidence is conflicting, the issue of acceptance is one of mixed law and fact, which the jury must decide under proper instructions. *Goldstandt-Powell Hat Co. v. Cuff* 243
2. **Same.** Where a retail merchant orders goods of a certain class and quality from a wholesale dealer, and it ships a part of the goods ordered, and also other goods which were not ordered, the retailer may pay for the goods of the kind and quality ordered without making himself liable for the goods not ordered. And where he does not accept the goods not ordered but, within a reasonable time, in the light of the surrounding circumstances, returns them, he will not be liable therefor. *Id.* 243
3. **Offer and Acceptance—Immaterial Variances.** An offer of sale of personal property and its acceptance must receive a reasonable construction, and the proposer is bound by its acceptance in that sense. Immaterial variances between the offer and its acceptance will be disregarded. *Kaw City M. & E. Co. v. Purcell M. & E. Co.* 357
4. **Rights of Seller — Purchasers — Attaching Creditors — Case.** Where articles of merchandise are sold and delivered, and the terms of the sale are that the same are to be paid for "spot cash," this means cash on the delivery of the goods, and where the same are delivered, and the vendee says to the vendor, "I will pay you as soon as I can check them up," and when the agent of the vendor went to the vendee's place of business five or six consecutive mornings after the delivery, and failed to find him in, but finally, after such repeated calls, he succeeds in finding him, and upon demand for payment is told by the vendee that he cannot pay for the goods, and for the vendor to take his goods back, and the agent of the vendor says, "all right," and immediately goes to the wholesale house of the vendor and reports the same, and on the same day comes back to the place of business of the vendee with the teams and wagons of the vendor to take away the goods, and finds the place of business of the vendee in the hands of a constable, who has made a levy upon the goods in question by virtue of a writ of attachment and refuses to give them up to the agent of the vendor, Held, that, in an action of replevin, the vendor can recover his goods as against such constable, or the attaching creditors of the vendee. *Mclver v. Williamson, etc., Co.* 454

SHERIFFS AND CONSTABLES:

1. **Fees and Costs—Return on Writ—Conclusiveness.** The return of a sheriff on an order of replevin is conclusive and binding against him; and where he shows by his return that he delivered

SHERIFFS AND CONSTABLES—Continued.

- cattle seized by him under the writ to the defendant, with the consent of the plaintiff, within ten days after taking such property under such writ, he cannot be allowed as a part of the costs of the case for feeding and caring for such cattle for a period of seventy days. *Dudley & Co. v. Clevenger* 208
2. **Same—Proper Expenses in Replevin.** Where a sheriff takes charge of property under an order of replevin, he can only be allowed for caring for the same during the time that he is in possession thereof. *Id.* 208

SIGNATURE—See "Bills and Notes."

SPECIFIC PERFORMANCE:

1. **Contract—Validity—Alienation by Homesteader.** A contract by a homesteader to alienate a portion of the tract while occupied by him as such, when he shall acquire title from the United States, is against public policy and void, and no action either at law or equity can be predicated thereon. *Prince v. Gosnell*..... 175
2. **Contract—Sale of Land—Parties.** A court of equity cannot enforce the specific performance of a contract to real estate against several joint owners where all the joint owners were not parties to the contract. *Lumber Co. v. Pyles*..... 445

STATUTES OF LIMITATIONS—See "Adverse Possession," "Limitation of Actions."

STATUTES CONSTRUED:

1. **UNITED STATES:—Statutes at Large.**
- | | |
|---|-----|
| 1875, March 3, ch. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568). | 1 |
| 1899, March 2, ch. 374, 30 Stat. 990 (U. S. Comp. St. 1901, p. 1581). | 1 |
| 1901, March 3, ch. 846, 31 Stat. 1093, | 159 |
2. **Compiled Statutes 1901. Pages 1568, 1581**..... 1
3. **OKLAHOMA STATUTES, 1893.**
- | | |
|-----------|-----|
| Sec. 511 | 361 |
| Sec. 822 | 21 |
| Sec. 2552 | 240 |
| Sec. 4107 | 302 |
4. **Wilson's Revised & Annotated Statutes, 1903.**
- | | |
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| Sec. 70 | 589 |
| Secs. 302, 304, 306 | 225 |
| Sec. 562 | 502 |
| Secs. 657, 660, 712, 714 | 324 |
| Sec. 781 | 433 |

STATUTES CONSTRUED—Continued.

Sec. 921	475
Sec. 1038	63
Secs. 1050, 1051	324
Sec. 3879	80
Sec. 4216	306
Sec. 4377	36
Sec. 4426	296
Sec. 4462	454
Sec. 4624	316
Secs. 4741, 4742	173
Sec. 4760	306
Sec. 4760	502
Sec. 4767	306
Sec. 4817	422
Sec. 4817	467
Secs. 5142, 5151, 5158	347
Sec. 5931	345
 5. Session Laws.	
1905, p. 331, ch. 28, Art. 9, sec. 1.....	230
1905, p. 341, ch. 31, Sec. 1.....	92

STREET RAILROADS:

Traveler, Duties of—Contributory Negligence. A driver of vehicle who suddenly turns his team to cross a street railway track without looking and listening for an approaching car, and without taking the ordinary care and precautions imperatively required of all who place themselves in a similar position of danger, is guilty of contributory negligence as a matter of law. <i>Railway Co. v. Fonville</i>	283
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SUBCONTRACTORS—See "Mechanic's Liens."

T.

TAXATION—See "Adverse Possession."

1. Certificates of Error—County Commissioners Authorized to Issue, When. By section 1, article 1, chapter 31, of the Session Laws of 1905, boards of county commissioners of the various counties of Oklahoma are authorized to issue certificates of error to taxpayers upon a proper showing in three classes of cases: First, where the same property has been assessed more than once for taxes of the same year; second, where the property has been assessed in the county for the year to which the same was not subject; third, where the property has been destroyed by flood or tornado to the extent of at least fifty per cent. of its cash value. In no other case or class of cases is there any provision for issuing certificates of error for taxes on property erroneously assessed. <i>Bostick v. Commissioners</i>	92
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TAXATION—Continued.

2. **Same—Acts of City Board of Equalization.** Where an assessment of property is made, and the board of equalization of the city within which such property is located raises the valuation of such property for the purpose of taxation, the board of county commissioners have no authority under the law to issue to the owner of such property a certificate of error upon the theory or because of the fact that the action of the board of equalization was unwarranted and without authority of law. *Id.*..... 92

3. **Same—Review by District Court—Restricted Jurisdiction.** Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only, which is the jurisdiction that the inferior tribunal had and none other; and in such case the district court cannot convert such action into an action of equity and assume a jurisdiction of equity that the inferior tribunal did not have. *Id.*..... 92

4. **Tax Deeds—Necessary Recital—Void, When.** A tax deed which does not show upon its face the amount for which the tract or parcel of land which it purports to convey was sold is for that reason void. *Eldridge v. Robertson* 165

5. **Same—Number of Lots Included in One Deed.** While a number of lots sold for taxes to the same individual may be included in one tax deed, the deed must, on its face, show affirmatively that the different lots were sold separately, and also the amount for which each lot was sold. *Id.*..... 165

6. **Personal Property Subject—Assessment in Two States.** Personal property, assessed in another state on January 1st of a given year, and brought in and acquiring a situs in this territory prior to the first day of March of the same year, is assessable and liable for taxes for that year in Oklahoma. *Spaulding Mfg. Co. v. Kendall* 345

7. **Same.** The territory has the right to tax property brought into the territory for the same year that it has paid taxes in another state or territory. *Id.* 345

8. **Real Estate—Sale for Taxes—Tax Deed Void, When.** When a tax deed shows on its face that several lots in a town were sold at one sale, and that the county purchased them as a competitive bidder, the deed is void. While the county treasurer has the right, under the law, to issue a second tax deed for the purpose of curing defects in the first, such authority cannot be exercised to overcome, by false recitations in such second deed, the record upon which it is based. *Keller v. Hawk* 407

9. **Same—Tax Certificate—Force of Recitations.** A tax certificate, under the law, does not pass title to the land sold. It is a written certification by the county treasurer of the facts regarding the sale of real estate for taxes, and is the legal evidence upon Vol. 19—43

TAXATION—Continued.

- which the holder thereof is, at the proper time, entitled to a deed, or the redemption money. It is *prima facie* evidence of the correctness of the facts recited therein, and, being made by the treasurer at or near the time of sale, where the recitations thereof are in conflict with the recitations of the tax deed based thereon, the recitations of the tax deed will prevail. *Id.* 407
10. **Same—Sale—County as Purchaser.** Where a county purchases real estate at a tax sale as a competitive bidder, the sale is void, and a tax certificate or tax deed which recites such fact or other facts from which such competition is necessarily disclosed, is void. *Id.* 407
11. **Same—Sale of Each City Lot Separately.** Each lot in a city or town must be assessed and sold separately, and, where a tax certificate or deed shows upon its face that several lots were sold together in one sale, such certificate or deed is void. *Id.* 407
12. **Same—Action to Try Title—Tender of Taxes Paid.** Where one purchases real estate at a tax sale, and goes into possession of the same under a void sale and deed, and the original owner brings an action in ejectment to recover possession, he is not required, as a condition precedent to bringing the action, to tender to the tax deed holder the amount of taxes paid by him. *Id.* 407
13. **Property Subject—Personalty on Military Reservations.** The taxing officers of Comanche county, Oklahoma, have the lawful right to levy and collect taxes on personal property belonging to private individuals and located on the Fort Sill military reservation, which is wholly within such county and constitutes a part thereof. The legislative power of the territory extends to all rightful subjects of legislation, and the only property which congress has prohibited the territory from taxing is the property of the United States. *Rice v. Hammond*..... 419

TIME—See "Abatement and Revival."

TRIAL:

1. **Order of Proof—Discretion of Court.** In an action for a balance due upon a written contract, where payment is not pleaded as a defense, the trial court at the beginning of the trial ruled that the burden of proof was upon the defendant, which ruling of the court was acquiesced in by both plaintiff and defendant without objection, and the defendant thereupon introduced his evidence, which tended to show a less indebtedness than that claimed by plaintiff. Held, that it was not material error thereafter for the court to admit proof by the plaintiff of the amount due upon the contract sued on. *Higgins v. Street*... 42
2. **Verdict—Duty to Direct, When.** It is the duty of a trial court to direct a verdict for a party when the evidence is such

TRIAL—Continued.

- that if a verdict were returned by the jury for the other party the court under the law would be required to set the same aside. **Guss v. Federal Trust Co.** 138
3. **General Finding.** A general finding for a party to an action is equivalent to finding in his favor each fact in issue in the case. **Gaffney v. Cline** 187
4. **Duty to Direct Verdict—When.** While questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the court ought to set aside a verdict returned in opposition to it, it is the duty of the court to withdraw the case from the consideration of the jury and direct a verdict. **Railway Co. v. Fonville** 283
5. **Directing Verdict—Error, When.** Where there is a material controverted question of fact upon which reasonable minds might fairly come to different conclusions, it is error for the court to direct a verdict. **Lane v. Railroad Co.** 324

V.

VENDOR AND PURCHASER:

- Fraud of Vendee—Worthless Securities—Rights of Vendor.** A vendor of real estate, who sells at an agreed price and accepts real estate in satisfaction of a portion of the purchase price and is induced by the fraud of the vendee to accept a worthless note and mortgage in payment of the balance of the purchase money, may, upon discovering the fraud, return or tender back the note and mortgage and recover the unpaid purchase money and have a vendor's lien for the amount so recovered. **Rhodes v. Arthur**.... 520

VENUE:

- Action to Recover Real Estate—County of Defendant's Residence.** By virtue of section 10 of the organic act of this territory, an action to recover the possession of real estate must be instituted in the county where the defendants or either of them reside or may be found. **Mouldin v. Rice**..... 589

VERDICT—See "Appeal and Error," "Criminal Law," "Trial."

W.

WAIVER—See "Appearance," "Jury."

WATERS AND WATER COURSES:

1. **Irrigation—Prior Right to the Use of Water, How Secured** The right to the use of water from a public stream for irrigation purposes depends upon the construction of appropriate

WATERS AND WATER COURSES—Continued.

- ditches, the conducting of water through such ditches to the place of intended application, and the application of such water to beneficial uses all within a reasonable time; and he has the best right who is first in time. **Gates v. Reservoir Co.** 83
2. **Same—Distribution of Supply.** Where there are conflicting claims for priority in the use of water rights for irrigation purposes, the court, in an application for injunction, may make equitable distribution of the supply of water according to the priority of claimants and the quantity each has by his labor and diligence acquired the right to divert. **Id.**..... 83

WITNESSES:

1. **General Reputation — Evidence of Inadmissible, When.** On the trial of a cause to a jury, where the defendant testifies as a witness in his own behalf, and is not impeached in any manner recognized by the rules of evidence, it is reversible error to permit him to introduce evidence of his general reputation for truth and veracity. **Bank v. Blakeman** 106
2. **Same.** The rule is stated in the opinion, as to when a party will be allowed to corroborate his own testimony by evidence of previous good character. **Id.** 106

WRIT OF ERROR—See "Appeal and Error."

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